THE

ORGANIZATION AND MANAGEMENT

OF BUSINESS CORPORATIONS

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AUTHOR'S PREFACE.

A FEW years ago a course of lectures was inaugurated in the Law Department of the Columbian (now The George Washington) University, of Washington, D. C., dealing with the organization and practical management of business corporations. Prior to that time the substantive law of corporations had been most ably taught in that department by a distinguished jurist occupying a seat on the bench of the Supreme Court of the United States. But because of the growing tendency of modern business men to incorporate, there arose a demand for a short practical course informing the students, who were to enter upon the active duties of their profession, exactly how to apply the principles they had learned at the feet of so eminent an instructor, and, starting with the request of the client that his business be incorporated, how to go through the successive stages essential to a valid and successful organization. The university, ever ready to keep pace with modern conditions, responded to the call, and the new chair was entrusted to the author.

Much to his regret, he found no text-book dealing with the subject in such a way as to enable him to place it in the hands of his students. He was obliged, therefore, to map out the course for himself in a series of lectures extending over a few weeks. Those lectures form the basis of this treatise, which has been compiled as a text-book for the classes studying this subject in The George Washington University. The author has also had in view the needs of many lawyers who may not have had the advantages of practical corporation office work,

and who, therefore, may desire some guide along the lines referred to. It is believed, too, that many laymen who are officers of corporations will find the book useful to them in carrying on their work.

The object of the author being as above stated, no attempt has been made to enter into a discussion of principles, except in so far as such discussion is pertinent to some live topic of practical corporation law of frequent recurrence in modern times, but which may not be considered as fully settled. The volume does not pretend to be a treatise on corporation law, but may be said to bear the same relation to that subject as equity pleading and practice bears to equity jurisprudence. Principles have been stated, an understanding of which is essential to the intelligent organization of corporations and attention to the details of their management. Great care has been taken to verify and support by citations every principle of law herein laid down. Inasmuch as corporation law is a subject of very rapid development during the past few years, in many instances the author has, without designating specific cases, referred to the most recent works on the subject, where a full discussion of the topics involved, with the cases applicable thereto, will be found. Frequent reference has thus been made to the very recent and admirable treatises on the law of corporations by Messrs. Clark and Marshall, and Mr. William W. Cook. Numerous citations will also be found of the tenth volume of the Cyclopedia of Law and Procedure, published during the present year, which consists almost wholly of a revised work on corporation law by that master of the subject, the late Hon. Seymour D. Thompson.

Many forms have been inserted which may be used in any jurisdiction. Forms corresponding to those which appear in some form books, and which are merely local in their character, will not be found here. In many instances the state statutes prescribe so minutely what must appear in certain corporation papers, and these statutes differ so materially one from another, that it has been found that the insertion of forms in such

instances, intended to be general in their nature, has resulted in more harm than good.

While fully conscious that crudities and imperfections must exist in this work, the author submits it to the kind judgment of the public, in the hope that it may never prove misleading, but may serve as a convenient source of information to those seeking guidance in this field of research.

WALTER C. CLEPHANE.

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TABLE OF CONTENTS.

INTRODUCTION.

CHAPTER I.

SELECTION OF A DOMICILE.

CHAPTER II.

INCORPORATORS AND SUBSCRIPTIONS TO STOCK.

CHAPTER III.

CERTIFICATE OF INCORPORATION.

CHAPTER IV.

ESSENTIALS OF INITIAL MEETINGS OF INCORPORATORS.

CHAPTER V.

PROCEEDINGS AT FIRST MEETING OF INCORPORATORS.

CHAPTER VI.

BY-LAWS.

CHAPTER VII.

FIRST MEETING OF DIRECTORS.

CHAPTER VIII.

STOCK.

CHAPTER IX.

MEETINGS.

CHAPTER X.

AMENDMENT OF CHARTER.

CHAPTER XI.

REORGANIZATION.

TABLE OF CASES CITED.

(Page xiii)

TABLE OF STATUTES CITED.

(Page xxv)

TABLE OF CASES CITED.

A

B

C

D

E

F

G

H

M

N

O

P

R

S

T

U

V

W

Y

Z

TABLE OF STATUTES CITED.

[THE FIGURES AFTER THE DASH REFER TO THE SECTIONS OF THE TEXT.]

[The figures after the dash refer to the sections of the text.]

THE ORGANIZATION

AND

MANAGEMENT OF BUSINESS CORPORATIONS.

INTRODUCTION.

§ 1. Individual business.

In primitive days, prior to the opening up of the avenues of trade and commerce, when the business interests of the individual were centered around the community in which he lived, there was little need for the employment of a large amount of capital in any given undertaking. The individual then stood for himself, and was easily able to handle, with his limited resources, all the business coming to his hands.

§ 2. Partnership Business.

But when the opportunities arising from communication with other neighborhoods were once grasped by mankind it became speedily apparent that, unless possessed of unusual wealth, no one man, or possibly two men, could raise and utilize sufficient capital to enable them to prosecute successfully any species of trade or industry of a larger magnitude than that of the small tradesman. Hence copartnerships sprang into existence, and became the forerunners of the great commercial houses so characteristic of the business world a few years ago.

§ 3. Corporate Business.

In modern times the partnership is rapidly becoming a thing of the past. The field of the wideawake business man is no more contracted than the world itself. The distant corners of the earth constitute his market just as truly as if the space which intervenes between him and them had been obliterated. By means of the telegraph and cable he is immediately apprised of the needs of the inhabitants of South Africa and of the islands of the sea, and must be prepared to meet the demands of these people, as well as of the denizens of those regions nearer home, without delay. This necessitates the employment of a larger capital than was ever dreamed of in the early days of the business world. Instead of a combination of two or three individuals, dozens or hundreds or thousands of persons must unite their capital in a commercial enterprise.

§ 4. When this stage of business development was reached, the futility of partnerships was quickly discovered.

§ 5. Legal Incidents of Partnerships.

Among the legal incidents of partnerships is the principle that each partner is bound by the acts of every other member of the firm within the scope of the partnership business.[1] Not

[1] T. Pars. Partn. §§ 108, 114, 115; Story, Partn. §§ 101, 102, 126; 1 Lindl. Partn. p. *124.

only is he liable to the extent of his proportionate part of the capital invested in the enterprise, but personally for the entire indebtedness contracted by any one of his associates on account of the joint undertaking.[2] Among a large number of persons there is almost sure to be at least one who would develop dishonest traits or prove unwise, and whose actions would involve all the members in unfortunate complications. So that it would be a hazardous thing for any one to become enwrapped in such an entanglement and expose himself and his family to the loss of all that which by his own industry or the efforts of others before him had been accumulated for the support of his declining years.

§ 6. Another principle of partnership law is that upon the death of one of the members of the firm the firm is eo instante dissolved.[3] Not only are the relations of the survivors with the deceased terminated, but so, also, are the relations of the survivors amongst themselves.[4] The business must be immediately wound up, and a settlement made with the estate of the deceased member.[5] Into a company of many persons death must frequently come. The results of this doctrine of the legal dissolution of the firm upon death, therefore, are embarrassing in the extreme.

§ 7. Again, if one of the associates in a copartnership desires at any time to part with his interest in the firm, he must either sell to one of his copartners, or else find a purchaser whom it is agreeable to his copartners to have associated with them. He cannot sell to a stranger, and give that stranger a right to become a member of the firm, without the consent

[2] T. Pars. Partn. §§ 249, 253; Story, Partn. § 260; 1 Lindl. Partn. p. *200.

[3] T. Pars. Partn. §§ 342, 343; Story, Partn. § 317; 2 Lindl. Partn. p. *590.

[4] Hoard v. Clum, 31 Minn. 186, 17 N. W. 275; Story, Partn. § 317; 2 Lindl. Partn. p. *590.

[5] T. Pars. Partn. § 344 et seq.; Story, Partn. §§ 344, 347; 2 Lindl. Partn. p. *591, and notes.

of the other parties interested.[6] This necessarily restricts the field of negotiations, and so tends to reduce the purchase price of the interest offered. For the same reason it is difficult to borrow money upon the security of an undivided interest in a partnership business. Even if a sale is effected, the withdrawing member is not thereby released from liability for the partnership indebtedness, but continues liable not only for the debts contracted up to the time of his withdrawal, but also for all debts subsequently contracted in favor of those creditors not informed of his retirement.[7]

§ 8. Reasons for Incorporating.

These reasons, with others which it is hardly necessary to elaborate, have caused our business men to discard partnerships, and to seek some other legal basis upon which they can rest their rights and by which they can measure their liabilities. While the reasons advanced apply with peculiar force to large combinations of capital comprising many individuals, the same principles prevail with a greater or less degree of inconvenience in smaller aggregations of capital.

§ 9. Origin and Growth of Corporations.

Among the Romans the corporation was a well-known institution.[8] The corporate conception was early adopted by the common law in England, and tradesmen were permitted, with the king's consent, to organize themselves into corporations. Though the fundamental principles governing this class of artificial entities have been well understood for many centuries, still we find that comparatively few business corporations existed until very modern times, when business men discovered in these artificial creations exactly what was needed to give them the protection required for the conduct of large affairs.[9]

[6] T. Pars. Partn. § 112; 1 Lindl. Partn. p. *363.

[7] Story, Partn. §§ 158, 161; T. Pars. Partn. §§ 313, 315; 1 Lindl. Partn. pp. *210, *213.

[8] Tayl. Priv. Corp. cc. 1, 2; 1 Bl. Comm. p. *469.

[9] 1 Cook, Corp. § 7.

§ 10. Legal Incidents of Corporations.

A corporation has the right to make by-laws prescribing and limiting the powers of its officers and agents;[10] those composing the corporation were not at common law individually liable for the debts of the concern;[11] the corporate existence was perpetual, and the death of a member did not legally affect it;[12] and shares of stock could be issued representing the interest of each member, which shares could be bought and sold in the open market, with the right in the purchaser to take the place of his vendor in the corporation irrespective of the wishes of the other stockholders.[13] In consequence of these incidents the present tendency among business men is to incorporate rather than subject themselves to the dangers surrounding business conducted under the guise of a partnership.

§ 11. Relations between Corporations and the State.

A better understanding of the nature of the corporate franchise may perhaps be gained by a brief reference to the theories at different times underlying the relations between the corporation and the state creating it. Under the old idea it was considered that corporations, being creatures of the state, should be guarantied by it to the public in all particulars of responsibility and management. It was required that the capital stock (which was the fund to which creditors must look for the satisfaction of their demands) should be paid up to its full value in actual cash, and that the debts should not exceed the amount of its capital. Hence such intangible assets as good will, trademarks, patents, and franchises generally could not be considered in making up the capital of a company. Creditors and

[10] 1 Bl. Comm. pp. *475, *476; Cook, Corp. § 4a.

[11] Tayl. Priv. Corp. § 700; Seymour v. Sturgess, 26 N. Y. 134; Walker v. Lewis, 49 Tex. 123; 1 Clark & M. Corp. §§ 16, 20; Terry v. Little, 101 U. S. 216, 25 L. Ed. 864.

[12] 1 Bl. Comm. pp. *468, *475.

[13] 1 Cook, Corp. §§ 7, 8; 1 Clark & M. Corp. §§ 16, 20; Morgan v. Struthers, 131 U. S. 246, 9 Sup. Ct. 726, 33 L. Ed. 132.

stockholders were protected by the state with almost the same degree of solicitude as if they were persons non compos or minors.

§ 11a. The more progressive states, finding that this policy was not adapted to modern business conditions, began to incline to the opposite extreme. Charters were granted which enabled corporations to do anything that an individual could do and in any manner, leaving the stockholders and creditors to protect their own interests. Such persons, voluntarily choosing to deal with corporations whose rights and liabilities were definitely prescribed in the law creating them, were left to their own good sense and business judgment to safeguard their rights, without any effort upon the part of the state to aid them.[14]

§ 11b. But when matters had gone to this extreme, the ease with which corporate affairs could be manipulated by evilly disposed managers to the prejudice of stockholders and creditors resulted in scandals of such magnitude and disastrous effects that within the past two or three years the effort of the states which have amended their corporation laws along the more liberal lines has been to adopt so much of the modern theories, and only so much, as is consistent with safety to the public.

§ 12. As an illustration of the most recent thought upon this subject, the report of the committee appointed by the state of Massachusetts to revise its corporation laws, transmitted to the Senate and House of Representatives of that commonwealth, January 14, 1903, is instructive. That committee (whose recommendations were subsequently adopted by the State Legislature) submitted a plan permitting the greatest possible latitude to business corporations in order to effect their purposes, provided that stockholders and creditors should at

[14] Report of Committee on Corporation Laws, Commonwealth of Massachusetts (1903) pp. 20-28.

all times be precisely informed of all the facts attending both the organization and management of such corporations.[15]

§ 13. Choosing a Domicile.

The first and most natural thought in the minds of those intending to incorporate a given company is to ascertain what the laws of the particular state in which the business is to be carried on provide. Other things being equal, it is generally considered better policy to organize under the domestic laws. But a perusal of these laws will frequently disclose the fact that they are not well adapted to the most efficient administration of the business in hand. This was the difficulty encountered by those desirous of incorporating in the state of Massachusetts prior to the revision of its corporation laws in the year 1903. The consequence is that incorporators are often driven to avail themselves of the laws of some other jurisdiction which are more favorable for their particular project. By a principle of state comity a corporation organized in one state will be permitted to do business in another, where the nature of the corporate powers conferred and exercised is not contrary to the public policy of the latter state as indicated by its statutes and decisions.[16]

§ 14. Interstate Comity.

It is quite competent, however, for the state to permit a foreign corporation to do business within its limits only under such restrictions and limitations, not conflicting with interstate commerce or with the federal Constitution, as it may see fit to

[15] Id.

[16] Bank of Augusta v. Earle, 13 Pet. (U. S.) 521, 10 L. Ed. 274; Runyan v. Coster, 14 Pet. (U. S.) 122, 10 L. Ed. 382; Cowell v. Springs Co., 100 U. S. 55, 25 L. Ed. 547; American & Foreign Christian Union v. Yount, 101 U. S. 352, 25 L. Ed. 888; Merrick v. Van Santvoord, 34 N. Y. 208; Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854; Carroll v. East St. Louis, 67 Ill. 568, 16 Am. Rep. 632.

impose, or even to forbid the privilege altogether.[17] But the different states of this Union have not gone to the extent of absolutely declining to permit corporations organized elsewhere to do business within their borders. The general practice is to grant this privilege to any foreign corporation upon its filing a certified copy of its charter, paying a license fee, and appointing a resident agent upon whom legal process may be served.[18] Where, however, a corporation is chartered in one state, and authorized to do business anywhere else except in that state, its corporate existence would not be upheld in another jurisdiction. As was said by the court in Land Grant Ry. & Trust Co. v. Board of Com'rs of Coffey County, 6 Kan. 245: "No rule of comity will allow one state to spawn corporations, and send them forth into other states to be nurtured and do business there, when said first-mentioned state will not allow them to do business within its own boundaries."

§ 15. Citizenship of Corporations.

While, without regard to its place of doing business or the residence of its stockholders, a corporation is a citizen of the state creating it for the purpose of giving jurisdiction to a federal court of a suit by or against it, under section 2 of ar-

[17] Lafayette Ins. Co. v. French, 18 How. (U. S.) 404, 15 L. Ed. 451; Doyle v. Insurance Co., 94 U. S. 535, 24 L. Ed. 148; Pensacola Telegraph Co. v. Telegraph Co., 96 U. S. 1, 24 L. Ed. 708; Western Union Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067; Waters-Pierce Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; Cable v. Insurance Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188; Floyd v. Loan & Investment Co., 49 W. Va. 327, 38 S. E. 653, 54 L. R. A. 536, 87 Am. St. Rep. 805.

[18] Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357; Ducat v. Chicago, 10 Wall. (U. S.) 410, 19 L. Ed. 972; Home Ins. Co. of New York v. Morse, 20 Wall. (U. S.) 445, 22 L. Ed. 365; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 377; Chattanooga Nat. Building & Loan Ass'n v. Denson, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870.

ticle 3 of the Constitution of the United States,[19] it is not a citizen, within the meaning of section 2 of article 4 of the Constitution, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"; and this section of the Constitution cannot be invoked in aid of the contention that a foreign corporation cannot be prevented from doing business in another state.[20]

[19] City of St. Louis v. Ferry Co., 11 Wall. (U. S.) 423, 20 L. Ed. 192; Chicago & N. W. R. Co. v. Whitton, 13 Wall. (U. S.) 270, 20 L. Ed. 571; Muller v. Dows, 94 U. S. 444, 24 L. Ed. 207; Kansas Pac. R. Co. v. Railroad Co., 112 U. S. 414, 5 Sup. Ct. 208, 28 L. Ed. 794.

[20] Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357; Ducat v. City of Chicago, 10 Wall. (U. S.) 410, 19 L. Ed. 972; Liverpool & London Life & Fire Ins. Co. v. Oliver, 10 Wall. (U. S.) 566, 19 L. Ed. 1029; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650.

CHAPTER I.

SELECTION OF A DOMICILE.

§ 16. Considerations Governing Domicile.

It being well settled that a corporation may be organized under the laws of any state, irrespective of its actual business habitat or the place of domicile of its incorporators,[1] it becomes the first duty of the corporation counsel to determine what laws will be most favorable to the efficient and economical manage-

[1] **Supra**, § 13, and note.

ment of any contemplated enterprise. In arriving at his conclusion he will endeavor to obtain for his clients the *maximum of benefit with the minimum of liability and expense.* This involves the consideration of many matters, the most important of which will be here enumerated, to wit:

1. The objects for which corporations may be organized.
2. The corporate powers conferred and the nature of their exercise.
3. The amount of capital permitted; when and how paid in.
4. Personal liability of stockholders and directors.
5. Taxation; initial and annual.
6. Number, residence, and qualifications of directors.
7. Nature and extent of annual reports required.
8. What books and records must be kept in the parent state.
9. Duration of corporation.
10. Miscellaneous statutory provisions.

§ 17. In many states the corporation laws were framed many years ago, and have not been considered by lawyers and well-informed laymen as particularly adapted to the demands of modern business. In others, however, a disposition has been manifested to hold out such strong inducements to intending incorporators as to result in a very close competition for the fees and taxes accruing from conferring the corporate privilege. In those states the provisions are so much more liberal than in the more conservative commonwealths that the attention of the corporation counsel may well be confined to the following jurisdictions when selecting a domicile for his proposed company, viz.: Maine, Massachusetts, Connecticut, New York, New Jersey, Delaware, District of Columbia, Virginia, West Virginia, South Dakota, Nevada, and Porto Rico. The states are changing their corporation laws so rapidly that the foregoing list of eligibles is considerably longer than it was two years ago, and will doubtless be materially lengthened within the next five years. No attempt, therefore, will be made to give in this treatise a summary of these laws, except

in so far as it may be necessary for the purpose of indicating the manner in which the proper state is to be determined.

§ 18. The Corporation Proposed.

Let us assume that five persons desire to organize a corporation for the purpose of conducting a general mercantile business to be carried on in the city of New York. The capital stock is to be one million ($1,000,000) dollars, divided into shares of one hundred ($100) dollars each, of which seven hundred thousand ($700,000) dollars is to be common stock, and three hundred thousand ($300,000) dollars preferred. These parties wish to avail themselves of the benefit of such laws as will expose them to as little personal liability as possible. They desire to save all the state fees they can, both at the commencement and during the progress of the corporate life. They are particularly anxious not to reveal to the public, any more than is absolutely necessary, the condition of their business from time to time.

§ 19. The foregoing may be said to be the conditions surrounding the average coterie of persons at this stage of their enterprise.

§ 20. Life of Corporations and Stockholders' Liability.

In each of the twelve political communities above enumerated such a corporation as is desired may be formed. In each its existence may be made perpetual, except in West Virginia, where the maximum life is fifty years,[2] and in South Dakota, where the maximum life is twenty years.[3] In all the liability of the stockholders is limited to the amount unpaid on their shares of stock or to the amount unpaid on their original subscriptions.

Digest of Laws.

§ 21. The following is a brief digest of the more important provisions of the laws of each of the twelve states.

[2] W. Va. Code, c. 54, § 11.

[3] S. D. Rev. Civ. Code 1903, § 780.

Those features of the laws generally deemed undesirable from the promoter's standpoint are stated in italics; those deemed particularly advantageous, in boldfaced type.

§ 22. **Maine.**

(1) **Corporations may hold stock in other corporations.**[4]

(2) Stock may be issued for cash, services rendered, or property, **as to the value of which (in the absence or fraud) the judgment of the directors is conclusive.**[5]

(3) *All meetings of stockholders must be held within the state.*[6]

(4) No maximum limit to amount of capital; minimum, $1,000.[7]

(5) No provision as to when any part of the capital must be paid in.

(6) **All incorporators and directors may be nonresident.**

(7) There must be at least three directors, **who may hold their meetings outside of the state,** and each of whom must be either a stockholder or a member of another corporation which is a stockholder.[8]

(8) Directors liable for declaring illegal dividends and for other acts involving breach of trust.[9]

(9) The records of the company, with list of stockholders, their residences and the amount of stock held by each, must be kept in the state.[10]

(10) Annual reports must state the names and residence of directors, president, treasurer, and clerk, location of principal office in the state, and amount of authorized capital stock.[11]

(11) Organization fee, $100.[12]

(12) Annual franchise tax, $50.[13]

(13) *Collateral inheritance tax on stock.*[14]

[4] Rev. St. Me. 1904, c. 47, § 51.
[5] Id. § 50.
[6] Miller v. Ewer, 27 Me. 509, 46 Am. Dec. 619.
[7] Rev. St. Me. 1904, c. 47, § 7.
[8] Id. § 19.
[9] Id. § 32.
[10] Id. § 20.
[11] Id. § 26.
[12] Id. § 8.
[13] Id. c. 8, § 18.
[14] Laws 1893, c. 146, as amended (Rev. St. 1903, c. 8, § 69).

§ 23. **Massachusetts.**

(1) *No express statutory power to hold stock in other corporations, except in gas companies.*[15]

(2) Stock may be issued for cash, property, or services.[16]

(3) *All meetings of stockholders must be held within the state.*[17]

(4) No maximum limit to amount of capital; minimum, $1,000.[18]

(5) No provision as to when any part of the capital must be paid in, except that agreement of association must state how much is to be paid before commencing business.[19]

(6) **All incorporators and directors may be nonresident.**

(7) There must be at least three directors,[20] **who may hold their meetings outside of the state,**[21] and each of whom (unless otherwise provided by the by-laws) shall be a stockholder.[22]

(8) Directors liable for illegally issuing stock,[23] declaring illegal dividends,[24] for false statements knowingly made by them in the articles of organization,[25] or reports,[26] and for debts contracted between the time of making or assenting to a loan to a stockholder or director and the time of its repayment, to the extent of such loan.[27]

(9) Copy of by-laws and minutes of meetings of the stockholders, and stock and transfer books containing a complete list of names and residences of stockholders, with the amount of stock held by each, must be kept in the state.[28]

(10) Annual reports required, which must state corporate name, location of offices, date of last preceding meeting, total amount of authorized capital stock, the amount issued and outstanding and the amount then paid thereon, the class or classes

[15] See chapter 110, § 79, Rev. Corp. Laws Mass.; Bus. Corp. Laws 1903, c. 437, § 4.

[16] B. C. L. 1903, c. 437, § 14.

[17] Id. § 20.

[18] Id. § 8.

[19] Id. § 11.

[20] Id. § 17.

[21] Id. § 25.

[22] Id. § 18.

[23] Id. § 14.

[24] Id. § 35.

[25] Id. § 11.

[26] Id. § 34.

[27] Id. § 35.

[28] Id. § 30.

(if any) into which it is divided, par value and number of its shares, and their market value; names and addresses of all the stockholders, and amount of stock held by each, and, if any stock is pledged, the names and residences of pledgees; names and addresses of the directors and officers, and date of expiration of term of office; also statement of the assets and liabilities of the corporation.[29]

(11) Organization fee, $250.[30]

(12) Annual franchise tax upon the value of its corporate franchise, after deducting the value of its real estate and machinery within the commonwealth subject to local taxation, and of securities which if owned by a natural person resident in the commonwealth would not be liable to taxation; also the value of its property situated in another state or country and subject to taxation there, excepting securities which if owned by a natural person resident in Massachusetts would be liable to taxation; the rate of assessment to be determined by an apportionment of the whole amount of money to be raised by taxation upon property in the commonwealth during the same year, after deducting the amount of tax assessed upon polls for the preceding year, upon the aggregate valuation of all cities and towns for the preceding year; this rate of assessment being subject to certain limitations expressed in the business corporation law.[31]

(13) *A collateral inheritance tax is imposed.*[32]

§ 24. Connecticut.

(1) **Corporations may acquire stock in other corporations.**[33]

(2) Stock may be paid for in cash or property, as to the value of which the judgment of the directors is final.[34]

[29] Id. § 45.
[30] Id. § 88.
[31] B. C. L. 1903, § 72, and section 74, as amended (Laws 1904, p. 225, c. 261).
[32] Rev. Laws Mass. 1902, c. 15.
[33] Conn. Corp. Law 1903, c. 194, § 11.
[34] Id. § 12.

(3) *All meetings of stockholders must be held within the state.*[35]

(4) No maximum limit to amount of capital; minimum, $2,000.[36]

(5) *At least $1,000 must be paid in before commencing business.*[37]

(6) **All incorporators may be nonresident.**

(7) There must be at least three directors, who should be stockholders.[38] *No statutory provision is made for holding directors' meetings outside of the state.*

(8) Directors liable for declaring illegal dividends[39] and for fraud in overvaluing the property received in payment for stock.[40]

(9) Original or duplicate transfer books containing names and addresses of each stockholder and the number of shares held by each must be kept in the state.[41]

(10) Annual reports required, showing name, residence, and post office address of each officer and director, amount of outstanding stock not paid in full and amount due thereon, and the location of the principal office in the state, with the name of the agent upon whom process may be served.[42]

(11) Organization fee, $500.[43]

(12) *An inheritance tax is imposed* except upon stock of decedents living in a state where no such tax is imposed.[44]

(13) **No annual franchise tax.**[45]

(14) *Voting trust illegal.*[46]

[35] Id. § 22.
[36] Id. § 63.
[37] Id. §§ 63, 69.
[38] Id. § 10.
[39] Id. § 5.
[40] Id. § 12.
[41] Id. § 18.
[42] Id. § 37.
[43] Id. § 61.
[44] Conn. Gen. St. § 2368, as amended May 6, 1903.
[45] Conn. Corp. Law, c. 194, § 61.
[46] Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32.

§ 25. **New York.**

(1) **Corporations may hold stock in other corporations.**[47]

(2) Stock may be issued for money, labor done, or property, **as to the value of which (in the absence of fraud) the judgment of the directors is conclusive.**[48]

(3) *It has been held that meetings of the stockholders outside of the state are invalid.*[49]

(4) No maximum limit to the amount of capital; minimum, $500.[50]

(5) *No debt can be incurred until $500 shall have been paid in in money or property. One-half the capital stock must be paid in within one year from date of incorporation.*[51]

(6) *At least one incorporator and one director must be a resident of the state of New York.*[52]

(7) There must be at least three directors,[52] **who may hold their meetings outside the state,**[53] and each of whom must be a stockholder unless he is named in the certificate of incorporation, provided the charter or by-laws do not dispense with this requirement.[54]

(8) *Directors liable for declaring illegal dividends, making false reports, breach of trust, and a number of other acts of misconduct specifically enumerated in the law.*[55]

(9) *Correct books of account of all business and transactions, and a stock book containing the names, alphabetically arranged, of all stockholders, showing their residences and number of shares owned by each, the time when they become owners*

[47] N. Y. S. C. L. § 40.

[48] Id. § 42.

[49] Ormsby v. Copper Co., 56 N. Y. 623.

[50] N. Y. B. C. L. § 2.

[51] Id. §§ 2, 3, 5; S. C. L. § 42.

[52] Id. § 2; G. C. L. §§ 4, 29, as amended (Laws 1892, pp. 1802, 1811, c. 687).

[53] N. Y. Laws 1904, c. 446, § 2.

[54] N. Y. S. C. L. § 20.

[55] Id. § 23, as amended (Laws 1892, p. 1829, c. 688), and sections 31, 48; Pen. Code N. Y. §§ 594–612.

thereof, and the amount paid thereon, must be kept within the state.[57]

(10) *Annual reports must show the amount of real property owned, the amount of capital stock and proportion actually issued; the amount paid in; the amount thereof employed in the state; the amount which the debts do not exceed; the minimum amount of assets; and the date and rate per centum of each dividend declared.*[58]

(11) Organization fee, $500.[59]

(12) For the purpose of computing the annual franchise tax a distinction is made between corporations paying dividends at the rate of 6 per cent. or more and those which do not. The former are required to pay an annual tax of one-quarter of a mill for each 1 per cent. of dividend on each dollar of the same proportion of its total capital as the assets employed in the state bear to its total assets. Those paying dividends of less than 6 per cent. are required to pay a tax of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within the state bears to the entire capital. Those paying no dividends are required to pay a tax of one and one-half mills on each dollar of appraised capital stock employed in the state.[60]

(13) *Direct and collateral inheritance tax on stock.*[61]

(14) **Cumulative voting permitted.**[62]

(15) **Voting trust authorized.**[62]

[57] N. Y. S. C. L. § 29, as amended (Laws 1892, p. 1831, c. 688).

[58] N. Y. Tax Laws, §§ 27, 189; N. Y. S. C. L. § 30.

[59] Laws 1896, c. 908, § 180; Laws 1901, c. 448.

[60] N. Y. Tax Laws, §§ 182, 183, 190.

[61] In re Whiting's Estate, 150 N. Y. 27, 44 N. E. 715, 34 L. R. A. 232, 55 Am. St. Rep. 640; In re Bronson's Estate, 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238, 55 Am. St. Rep. 632.

[62] N. Y. G. C. L. § 20.

§ 26. New Jersey.

(1) **Corporations may hold stock in other corporations.**[63]

(2) Stock may be issued for cash or property, as to the value of which (in the absence of fraud) the judgment of the directors is conclusive.[64] *No statutory authority is given to issue stock for services performed.*

(3) *All meetings of stockholders must be held within the state.*[65]

(4) No maximum limit to amount of capital; minimum, $2,000.[66]

(5) One thousand dollars of capital stock must be subscribed before the company can do business.[67]

(6) **Incorporators may all be nonresident,**[68] *but at least one director must reside in the state.*[69]

(7) There must be at least three directors,[69] who may hold their meetings outside of the state if the charter or by-laws so provide,[70] and each must be a stockholder.[69]

(8) Directors liable for declaring unauthorized dividends,[71] for making false reports, or withholding reports or signs [72] required by law; [73] for making loans to stockholders or officers; and for breach of trust.[74]

(9) Transfer books and stock books containing the names and addresses of the stockholders and number of shares held by each must be kept in the state.[75]

(10) Annual reports must show the name of the corporation,

[63] N. J. Corp. Act, § 51.
[64] Id. §§ 48, 49; Donald v. Refining Co., 62 N. J. Eq. 729, 48 Atl. 771.
[65] N. J. Corp. Act, § 44.
[66] Id. § 8.
[67] Id. §§ 8, 48, 49.
[68] Central R. of New Jersey v. Railroad Co., 31 N. J. Eq. 475.
[69] N. J. Corp. Act, § 12.
[70] Id. § 44.
[71] Id. § 30, as amended (P. L. 1896, p. 286).
[72] Id. § 45; Appleton v. Malting Co. (Ct. Err. & App. March 11, 1903) 54 Atl. 454.
[73] N. J. Corp. Act, § 29. [74] Id. §§ 55, 92. [75] Id. § 33.

location of the registered office in the state, and name of agent upon whom process may be served, character of its business, amount of authorized capital stock, and amount actually issued and outstanding; also the names and addresses of the officers and directors and when their terms of office expire; date of the next annual meeting for election of directors, whether the name of the corporation has been at all times displayed at the entrance of its registered office, and whether such corporation has kept there the books required by law.[76]

(11) Organization fee, $200.[77]

(12) Annual franchise tax, $1,000.[78]

(13) **No inheritance tax on stock owned by nonresidents.**[79]

(14) **Cumulative voting permitted.**[80]

(15) **Voting trusts may be created under certain limitations.**[81]

§ 27. Delaware.

(1) **Corporations may hold stock in other corporations.**[82]

(2) Stock may be issued for cash, services rendered, or property.[83]

(3) **Stockholders' meetings may be held outside the state of Delaware if so provided in the by-laws.**[84]

(4) No maximum limit to amount of capital; minimum limit, $2,000.[85]

(5) One thousand dollars of the capital stock must be subscribed before the company can do business.[86]

(6) **All incorporators may be nonresident,** *but at least one director must reside in the state.*[87]

[76] Id. § 43.
[77] Id. § 114.
[78] N. J. P. L. 1901, p. 31.
[79] N. J. P. L. 1894, p. 318.
[80] N. J. P. L. 1900, p. 418.
[81] Chapman v. Bates, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459.
[82] Del. Corp. Law 1903, § 135.
[83] Id. § 14.
[84] Id. § 32.
[85] Id. § 5.
[86] Id.; Dill, N. J. Corp. p. 22.
[87] Del. Corp. Law, § 9.

(7) There must be at least three directors,[87] who may hold their meetings outside of the state if the by-laws so provide,[88] and each must be a stockholder.[87]

(8) Directors liable for making unauthorized dividends,[89] for knowingly making false reports or withholding reports required by law,[90] and for breach of trust.

(9) Original or duplicate stock ledger containing the names and addresses of the stockholders, and the number of shares held by each, must be kept in the state.[91]

(10) Annual reports must state the location of the principal office in the state, names of officers, amount of the authorized capital and what part of it is actually paid in, what part is invested in real estate and the annual tax thereon, and the amount invested in manufacturing or mining within the state, or both.[92]

(11) Organization fee, $150.[93]

(12) Annual franchise tax, $500.[94]

(13) *Collateral inheritance tax on stock.*[95]

(14) Bondholders may be given the right to vote.[96]

§ 28. District of Columbia.

(1) *Corporations cannot use any of their funds in the purchase of stock of other corporations.*[97]

(2) Stock may be issued either for money or property at its actual value.[98] *No statutory authority is given to issue stock for services performed.*

(3) The statute is silent as to where the meetings of the stockholders may be held.

[87] Del. Corp. Law, § 9.
[88] Id. § 32.
[89] Id. § 35.
[90] Id. § 37.
[91] Id. § 29.
[92] Del. Franchise Tax Act 1901, § 2.
[93] Del. Corp. Law, § 129.
[94] Del. Franchise Tax Act 1901, § 4.
[95] Del. Laws, vol. 13, c. 390, § 12.
[96] Del. Corp. Law, § 29.
[97] D. C. Code, § 620.
[98] Id. § 613.

(4) No maximum or minimum limit to the amount of capital.

(5) *Ten per cent. of the capital stock must be paid in prior to the commencement of business.*[99]

(6) *The majority of the trustees shall be citizens of the District.*[100]

(7) There must be at least three trustees, each of whom must be a stockholder.[100] No provision is made as to the place where trustees may hold their meetings.

(8) Trustees liable for knowingly making false reports,[101] for making loans to stockholders upon the security of the corporate stock,[102] and for declaring illegal dividends.[103]

(9) List of all persons who are or have been within six years stockholders of the company, with their places of residence, number of shares held by them respectively, the time when they became the owners thereof, and amount of stock actually paid in, must be kept in the District.[104]

(10) Annual reports must be filed and published, stating amount of capital and the proportion actually paid in, and the amount of existing debts.[105] Schedule must be filed annually stating tangible personal property.[106]

(11) **There is no organization fee,** except a nominal fee to the recorder of deeds for recording the certificate of incorporation.

(12) **No annual franchise tax.**[107]

(13) **No inheritance tax on stock.**

§ 29. Virginia.

(1) **Corporations may hold stock in other corporations if so stated in the charter.**[108]

[99] Id. § 613.
[100] Id. § 608.
[101] Id. § 619.
[102] Id. § 621.
[103] Id. § 622.
[104] Id. §§ 627, 628.
[105] Id. § 617.
[106] 32 Stat. 617.
[107] 33 Stat. 564.
[108] Gen. Inc. Act Va. c. 5, § 2h [1 Va. Code 1904, p. 557, § 1105e, subd. 2h].

(2) Stock may be issued for cash, services rendered, or property, **as to the value of which (in the absence of fraud) the judgment of the directors is conclusive.**[109]

(3) *Annual meetings of the stockholders must be held within the state.*[110]

(4) No maximum or minimum limit to the amount of capital.

(5) No provision as to when any part of the capital must be paid in.

(6) **All incorporators and directors may be nonresident.**[111]

(7) There must be at last three directors,[112] **who may hold their meetings outside of the state.**[113] The statute does not require directors to be stockholders.

(8) Directors liable for willfully making false reports[114] and for declaring illegal dividends.[115]

(9) **No books need be kept in the state.**

(10) Annual reports must state the name of the corporation, location of principal office in the state and name of the agent upon whom process may be served, character of its business, amount of authorized capital stock, what part of it is actually issued and outstanding, names and addresses of the officers and directors and when their terms of office expire, and the date appointed for the next annual meeting of the stockholders.[116]

(11) Organization fee, $600.[117]

(12) Annual franchise and registration fee, $225.[118]

(13) *Collateral inheritance tax on stock.*[119]

[109] Id. § 9 [1 Va. Code 1904, p. 559, § 1105e, subd. 9].

[110] Id. § 7 [1 Va. Code 1904, p. 559, § 1105e, subd. 7].

[111] Id. c. 1, § 14 [1 Va. Code 1904, p. 532, § 1105a, subd. 14].

[112] Id. § 13 [1 Va. Code 1904, p. 532, § 1105a, subd. 13]; Id. c. 5, § 10 [1 Va. Code 1904, p. 560, § 1105e, subd. 10].

[113] Id. c. 5, § 5 [1 Va. Code 1904, p. 558, § 1105e, subd. 5].

[114] Id. § 26 [1 Va. Code 1904, p. 564, § 1105e, subd. 26].

[115] Id. § 60 [1 Va. Code 1904, p. 578, § 1105e, subd. 60].

[116] Id. § 39 [1 Va. Code 1904, p. 570, § 1105e, subd. 39].

[117] Tax Law 1903, § 38 [2 Va. Code 1904, p. 2215].

[118] Id. §§ 41, 43 [2 Va. Code 1904, p. 2218].

[119] Id. § 44 [2 Va. Code 1904, p. 2219].

(14) **Cumulative voting permitted.**[120]

(15) **Bondholders may be given the right to vote.**[121]

§ 30. West Virginia.

(1) **Corporations may hold stock in other corporations.**[122]

(2) Stock may be issued for cash, services rendered, or property, **as to the value of which (in the absence of fraud) the judgment of the directors or stockholders is conclusive.**[123]

(3) **Stockholders' meetings may be held outside of the state.**[124]

(4) No maximum or minimum limit to the amount of capital.

(5) Ten per cent. of the amount subscribed by each incorporator must be paid in before signing the articles of incorporation.[125]

(6) **All incorporators and directors may be nonresident.**[126]

(7) There must be at least five directors (unless otherwise provided in the by-laws),[126] **who may hold their meetings outside of the state,**[127] **and none of whom need be stockholders.**[126]

(8) Directors liable for declaring illegal dividends [128] and for breach of trust.

(9) **No books need be kept in the state.**

(10) Annual reports must be made showing the name of the corporation, date of its charter, name and post office address of the president, secretary, and treasurer, the amount of its authorized capital stock, number of acres of land held in the

[120] Gen. Inc. Act Va. c. 5, § 19 [1 Va. Code 1904, p. 563, § 1105e, subd. 19].

[121] Id. § 29 [1 Va. Code 1904, p. 565, § 1105e, subd. 29].

[122] W. Va. Code, c. 52, § 3, as amended (Acts 1901, p. 94, c. 35, § 1).

[123] Spring Garden Bank v. Lumber Co., 32 W. Va. 357, 9 S. E. 243, 3 L. R. A. 583; Richardson v. Graham, 45 W. Va. 134, 30 S. E. 92.

[124] W. Va. Code, c. 54, § 23.

[125] Id. § 7.

[126] Id. c. 53, § 49.

[127] Id. c. 54, § 23.

[128] Id. c. 53, § 40.

state (if the number exceeds 10,000), and such other facts as the auditor may require.[129]

(11) Organization fee, $410.[130]

(12) Annual franchise tax, $410.[130]

(13) *Collateral inheritance tax on stock.*[131]

(14) **Cumulative voting permitted.**[132]

(15) **Action of majority of directors may be valid without calling a regular meeting of the board.**[133]

§ 31. South Dakota.

(1) *Corporations have no statutory power to hold stock in other corporations.*

(2) Stock may be issued for cash, services rendered, or property.[134]

(3) **Stockholders' meetings may be held outside of the state.**[135]

(4) No maximum or minimum limit to the amount of capital.

(5) No provision as to when any part of the capital must be paid in.

(6) *One-third of the incorporators must reside in the state.*[136]

(7) There must be at least three directors,[137] **who may hold their meetings outside of the state,**[138] and all of whom must be stockholders.[137]

(8) Directors liable for illegally reducing the capital stock, for declaring illegal dividends, and for creating debts beyond the subscribed capital stock,[139] and for otherwise willfully causing the corporation to become insolvent in violation of the

[129] Id. c. 32, § 88, as amended (Acts 1901, p. 114, c. 35, § 36).
[130] Id. c. 32, § 87, as amended (Acts 1901, p. 112, c. 35, § 35)
[131] Id. § 51a (I).
[132] Id. c. 53, § 44.
[133] Id. § 51, as amended (Acts 1901, p. 100, c. 35, § 16).
[134] S. D. Const. art. 17, § 8.
[135] Rev. Civ. Code S. D. § 786.
[136] Id. § 410.
[137] Id. § 434.
[138] Id. § 786.
[139] Id. § 436.

statute;[140] also for failing to file the annual report,[144] or for willful false statements in such annual report;[141] also for fraudulent appropriation of property.[142]

(9) *Copy of the by-laws, record of all business transactions, journal of all meetings of directors and stockholders, embracing every act done or ordered to be done, and stating who were present and absent as well as other details, must be kept in the "office of the corporation"; also a stock and transfer book showing the names of all stockholders, installments paid or unpaid, assessments levied and paid or unpaid; particulars as to every stock transfer, etc.*[143]

(10) Annual reports must be published, stating the capital stock and amount actually paid in, and amount and nature of indebtedness due to and by the corporation, number and amount of dividends and when paid, and net amount of profits.[144]

(11) Organization fee, $25.[145]

(12) **No annual franchise tax.**

(13) **No inheritance taxes.**

(14) **Cumulative voting permitted.**[146]

§ 32. **Nevada.**

(1) **Corporations may hold stock in other corporations.**[147]

(2) Stock may be issued for cash, services rendered or property, **as to the value of which (in the absence of fraud) the judgment of the directors is conclusive.**[148]

(3) **Stockholders' meetings may be held outside of the state.**[149]

(4) No maximum limit to the amount of capital; minimum, $2,000.[150]

(5) *$1,000 of the capital stock must be subscribed before the company can commence business.*[150]

140 Rev. Civ. Code S. D. § 787.
141 Id. § 437.
142 Id. §§ 436, 449.
143 Id. §§ 430, 445.
144 Id. § 784.
145 S. D. Laws 1903, c. 141.
146 Const. S. D. art. 17, § 5.
147 Nev. Gen. Inc. Laws 1903, § 110.
148 Id. §§ 28, 54.
149 Id. §§ 12–14.
150 Id. § 4.

(6) **All incorporators and directors may be nonresident.**

(7) There must be at least three directors, who may hold their meetings outside of the state.[151]

(8) Directors liable for declaring illegal dividends [152] or illegally reducing capital stock,[153] for publishing false statements,[154] and for breach of trust.[155]

(9) *Stock ledger containing the names and addresses of all stockholders, with the number of shares of stock owned by each, must be kept in the state.*[156]

(10) *Annual reports required, stating names of all directors and officers, with date of election or appointment of each, term of office, residence and post office address of each, and character of his business, with location of principal office in the state and name of agent in charge thereof;* [157] *certificate also required stating amount of each installment paid in on capital stock, character of payment, and value of property or services accepted in payment; also total amount of capital stock previously paid and reported.*[158]

(11) Organization fee, $150.[159]

(12) **No annual franchise tax,** except retaliatory taxation.[160]

(13) **No inheritance taxes.**

(14) **Cumulative voting permitted.**[161]

(15) **Bondholders may be given the right to vote.**[162]

(16) **Action of majority of stockholders or directors may be valid without calling a regular meeting.**[163]

§ 33. Porto Rico.

(1) **Corporations may hold stock in other corporations owning property necessary for its business.**[164]

151 Id. §§ 14, 23.
152 Id. § 68.
153 Id. § 42.
154 Id. §§ 73, 77.
155 Id. § 76.
156 Id. §§ 58, 71.
157 Id. § 85.
158 Id. § 34.
159 Id. § 102.
160 Id. § 106.
161 Id. § 20.
162 Id. § 11.
163 Id. §§ 23, 111.
164 Civ. Code Porto Rico, tit. 2, c. 1, § 45.

(2) Stock may be issued for cash or property, as to the value of which (in the absence of fraud) the judgment of the directors is conclusive.[164] *No statutory authority is given to issue stock for services performed.*

(3) *All meetings of stockholders must be held in the island.*[165]

(4) No maximum limit to the amount of capital; minimum limit, $2,000.[166]

(5) *Cannot commence business until at least $1,000 has been paid in.*[166]

(6) Incorporators may be all nonresidents, *but at least one director must reside on the island.*[167]

(7) There must be not less than three directors,[168] who may hold their meetings outside of the state if the charter or by-laws so provide,[169] and each must be a stockholder.[168]

(8) Directors liable for declaring unauthorized dividends,[170] for knowingly making false reports,[171] and for voting to incur any indebtedness in excess of capital.[172]

(9) Transfer books, and stock books containing the names and addresses of stockholders and number of shares held by each, must be kept on the island.[173]

(10) Annual reports must show the name of the corporation, location of the principal office on the island, and name of the agent upon whom process may be served; object of the corporation, amount of its authorized capital stock, and the amount actually issued and outstanding, existing liabilities, names and addresses of directors and officers and terms of office, date of next annual meeting for election of directors, and whether the law regarding the maintenance of the office on the island has been complied with.[174]

(11) Organization fee, $150.[175]

(12) No annual franchise tax.

[164] Civ. Code Porto Rico, tit. 2, c. 1, § 45.
[165] Id. § 42a.
[166] Id. § 36 (5).
[167] Id. § 38.
[168] Id. § 40.
[169] Id. § 41.
[170] Id. § 46.
[171] Id. § 61.
[172] Id. § 62.
[173] Id. §§ 41, 47.
[174] Id. § 52.
[175] Id. § 63.

(13) **No inheritance tax on stock owned by nonresidents.**[176]

(14) **Cumulative voting permitted.**[177]

NOTE. The corporation law of Porto Rico was patterned after that of New Jersey.

ANALYSIS OF THE FOREGOING LAWS.

§ 34. We must assume that the shares of stock which will be issued by our proposed corporation will ultimately find their way into the hands of many people, the majority of whom will probably reside in the vicinity of the city of New York. That being the place where the business of the company is to be carried on, it will be convenient to have the corporate meetings held as near the main office of the company as practicable. It would be extremely troublesome to the stockholders to be obliged to travel to a distant state every time a stockholders' meeting is to be held. If, therefore, it should appear that certain places whose corporation laws are otherwise adapted to our purpose require all corporate meetings to be held within their borders, such states may be thrown out of our consideration, provided other jurisdictions nearer home hold out inducements nearly as great.

§ 35. A glance at the foregoing table will satisfy us that it would be inconvenient to take advantage of the beneficial laws of *Maine, Massachusetts, Virginia,* or *Porto Rico* on this very ground. The meetings of stockholders of corporations chartered by any of those jurisdictions must be held within the state or territory granting the charter.[178] While those residing near to or within the borders of any of these commonwealths might well incorporate in one of them, we find them

[176] Rev. St. & Codes Porto Rico, p. 455, § 368.

[177] Civ. Code Porto Rico, tit. 2, c. 1, § 49.

[178] Miller v. Ewer, 27 Me. 509, 46 Am. Dec. 619; B. C. L. Mass. 1903, c. 437, § 20; Gen. Inc. Act Va. c. 5, § 7 [1 Va. Code 1904, p. 559, § 1105e, subd. 7]; Civ. Code Porto Rico, tit. 2, c. 1, § 42a.

unsuited for our purposes, with no counterbalancing advantages which cannot be found elsewhere.

§ 35a. The inconvenience of holding stockholders' meetings at some distance from the place of business and from the residence of shareholders might be obviated by delivering proxies to persons either residing within the state or who can be persuaded to travel there for the purpose of such meetings. But as a rule stockholders like to be able to attend such meetings in person, and learn for themselves how the business of the company is being conducted, even though on ordinary occasions they may not avail themselves of the privilege.

§ 35b. In *Maine* [179] and *Massachusetts* [180] a collateral inheritance tax is imposed upon stock whether owned by residents or nonresidents—a burden which it is well to avoid if possible.

§ 35c. The detailed nature of the annual report required in *Massachusetts* [181] necessitates greater publicity than that to which our supposed incorporators desire to be subjected, and in that state no express authority is given for holding stock in other corporations.

§ 36. In *Connecticut* we have the same restriction upon the place of holding stockholders' meetings, to wit, that they must be held within the state; but as Connecticut is so easily accessible to New York, this will not prove very much of a hindrance. There is, however, an omission in the statute which might cause trouble. No statutory provision is found enabling the directors to hold their meetings outside of the state. The directors should be able to meet at short notice at a place readily available to all concerned. If they must travel outside of the state to accomplish this, the machinery for conducting the corporate business will be found somewhat cumber-

[179] Laws 1893, c. 146, as amended (Rev. St. 1904, c. 8, § 69).
[180] Rev. Laws Mass. 1902, c. 15.
[181] B. C. L. Mass. 1903, c. 437, § 45.

some. More will be said in another place upon the law relating to the place of holding such meetings.[182]

§ 36a. Should the stockholders desire to organize a voting trust, they will in this state be met with a decision squarely holding such combinations illegal.[183] A consideration which would influence many in determining to select Connecticut as the domicile of a corporation is the fact that because that state requires no annual franchise tax, this yearly expenditure, which must be made under the laws of most other places, would be saved.

§ 37. *South Dakota* does not seem attractive from our standpoint. One-third of the incorporators must reside in that state.[184] For a corporation whose habitat is in New York this would not be particularly conducive to the proper transaction of business. Many corporations overcome this difficulty by resorting to dummy incorporators and directors who reside in that state. But this is hardly a dignified procedure nor one that commends itself to the average business man.

§ 37a. On examining further into the laws of that state, two features which exist would cause us to hesitate a long while before resorting to the protection of its franchise. These are, first, the failure to permit the holding of stock in other corporations; and, second, the fact that every corporate act must appear on record, open to the inspection of every creditor.[185]

§ 37b. As offsetting these disadvantages, this state provides the same economical exemption from any annual franchise tax as does Connecticut.

§ 38. Much has been said by corporation promoters throughout the country about the advantages offered under the Code of the *District of Columbia,* frequently spoken of as "The

182 Infra, c. II.
183 Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32.
184 Rev. Civ. Code S. D. § 410.
185 Id. § 445.

Great National Corporation Law." It is true that this is a law passed by the Congress of the United States, but that it is "national" in any sense of the word is a misnomer. In enacting this law Congress acted merely as the local legislature of the District of Columbia, under that power in the Constitution of the United States which gives to Congress the right to "exercise exclusive legislation in all cases whatsoever over such District (not exceeding ten miles square) as may by cession of particular states, and the acceptance of Congress, become the seat of government of the United States." [186]

§ 38a. No authority is found in this clause for creating a corporation except in this federal territory, and charters granted under its sanction are really no more national than are charters granted under the laws of any state.[187]

§ 38b. The law is crude in many respects. Instead of being framed after the approved models which have been found by experience to work so well elsewhere, it is an astonishing fact that many of the provisions the wisdom of inserting which in other codes of laws has been demonstrated by experience are entirely omitted in this compilation, and much is left to conjecture. The courts have not yet construed the law, and persons availing themselves of it will be left in great doubt upon many points.

§ 38c. The fact that the residences of the majority of the "trustees" (not "directors," as they are generally called) is restricted to the District of Columbia will prevent our proposed corporation from utilizing these laws.[188] It has been claimed that this section of the Code relates only to the trustees named in the certificate of incorporation, but the ground for this contention is not apparent. The provision that the corpora-

[186] U. S. Const. art. 1, § 8, cl. 17.

[187] Daly v. Insurance Co., 64 Ind. 1; Williams v. Creswell, 51 Miss. 817; Hadley v. Trust Co., 2 Tenn. Ch. 122; 10 Cyc. 169. See, also, Huntington v. Bank, 96 U. S. 388, 24 L. Ed. 777; Scheffer v. Insurance Co., 25 Minn. 534.

[188] D. C. Code, § 608.

tion may not transact business until 10 per cent. of the capital shall have been actually paid in may also prove a stumbling-block.[189] It may not be desirable, either, to file an annual report stating the amount of existing debts, as the District of Columbia Code specifies must be done.[190] In this connection, however, it should be stated that the only penalty provided for not making this report is that any interested person may by mandamus proceedings compel the publication of the report, in which case the corporation officers at fault may be compelled to pay all the expenses of the proceeding, including counsel fees.[191]

§ 38d. No corporation organized under the District of Columbia laws can use any of its funds in the purchase of stock in another corporation.[192]

§ 38e. It is also well to bear in mind that a District of Columbia corporation (which under the law is a citizen of the District of Columbia) is not permitted to sue in the federal courts, because, not being a citizen of any *state,* it is not embraced within the privilege conferred by the Constitution of the United States in this regard.[193]

§ 38f. Other sections of the law might be cited which would have a deleterious effect, but these are sufficient to indicate that the District of Columbia is not a favorable domicile, at least for *nonresident* corporations, however wise it might be for *resident* corporations to organize there.

§ 38g. There is nevertheless great economy in incorporating under these laws, inasmuch as there is no fee charged either for conferring the corporate privilege (except the recorder's fee for recording the charter) nor for the annual franchise.

189 Id. § 613.
190 Id. § 617.
191 Id. § 618.
192 Id. § 620.
193 Hepburn v. Ellzey, 2 Cranch (U. S.) 445, 2 L. Ed. 332; Barney v. Baltimore, 6 Wall. (U. S.) 280, 18 L. Ed. 825; Infra, § 38a, and note; In re Cushing's Estate, 40 Misc. Rep. 505, 82 N. Y. Supp. 795; Adams Exp. Co. v. Railroad Co. (C. C.) 16 Fed. 712.

§ 39. An examination of the new incorporation law of the state of *Nevada* discloses none of the undesirable features indicated in considering the laws of the states before mentioned. In fact it seems to have been the effort of the framers of this law to weave into it the particularly attractive provisions enacted by the legislatures of the states of New Jersey, Delaware, and West Virginia, which we shall presently consider. There is no annual franchise tax. Those residing in Western states would do well to seriously consider the statute of this state before deciding to incorporate elsewhere. But to Eastern capitalists several objections present themselves: First. It is far away from them and their business, and in the present state of corporate development suspicion is apt to be aroused in the minds of the public if resort is had to a state so distant, if similar advantages can be found nearer home. Second. It is unwise, if not unlawful, to hold the initial meeting outside of the state which confers the charter privileges. This would practically require our intended incorporators either to travel nearly to the Pacific Coast to organize, or else to send their proxies to some one in that state, and effect their organization through straw men—a device which is frequently resorted to, but one the wisdom of which is doubtful.

§ 40. This leaves for our consideration only four states, viz., *New York, New Jersey, Delaware,* and *West Virginia.* Taking first the three states which are foreign to the proposed place of business of our assumed incorporators, a brief comparison of their laws is in order. Of these states West Virginia was the pioneer in liberal incorporation laws. The revenues derived from the creation of corporations there became so great that New Jersey so changed its statute as to permit of very much greater liberality than previously was allowed. Delaware then passed a law copied very closely from that of New Jersey, but adding certain provisions not included in the legislation of the latter state.

§ 41. Some of the differences between the laws of these two last-named states are as follows: In Delaware stock may be issued for services rendered,[194] not so in New Jersey;[195] but this omission may be so easily circumvented in practice as to cause little concern. In New Jersey the judgment of the board of directors as to the value of the property taken for stock is, in the absence of fraud, conclusive.[196] The Delaware statute makes a similar provision,[197] but it has been contended that it is opposed to the constitution of that state; if so, it would be void. Delaware has an advantage over New Jersey, in that by the laws of the former state stockholders' meetings may be held beyond the limits of the state,[198] whereas in New Jersey they must be held in the state.[199] In view of the fact that but little time would be consumed in crossing the ferry between New York City (where our intended place of business is to be) and Jersey City, this will not prove an embarrassment in this particular case. Both states have a collateral inheritance tax, but in New Jersey it does not apply to nonresidents,[200] whereas in Delaware it does.[201] In Delaware bondholders may be given the right to vote.[202] No such power is given by the New Jersey laws; but the laws of the latter state do permit cumulative voting,[203] a feature upon which the statutes of Delaware are silent. In New Jersey, moreover, voting trusts may be created under certain limitations.[204]

194 Del. Corp. Laws 1903, § 14.
195 N. J. Corp. Act, §§ 48, 49.
196 N. J. Corp. Act, §§ 48, 49; Donald v. Refining Co., 62 N. J. Eq 729, 48 Atl. 771.
197 Del. Corp. Law 1903, § 14.
198 Id. § 32.
199 N. J. Corp. Act, § 44.
200 N. J. P. L. 1894, p. 318.
201 Del. Laws, vol. 13, c. 390, § 12.
202 Del. Corp. Law 1903, § 29.
203 N. J. P. L. 1900, p. 418.
204 Chapman v. Bates, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459.

§ 41a. On the whole, the laws of New Jersey seem more favorable than those of Delaware for our purposes, although the initial fee in Delaware for organizing a corporation is only $150,[205] as opposed to $200 in New Jersey,[206] and the annual franchise fee in the former state is only $500,[207] as opposed to $1,000 in New Jersey.[208]

§ 41b. Contrasting the laws of New Jersey with those of *West Virginia* we find their main provisions quite similar. Under the West Virginia laws, stock may be issued for services rendered,[209] and stockholders' meetings may be held outside of the state.[210] None of the directors need be residents,[211] as is the case in New Jersey.[212] No corporate books need be kept there, and the annual reports required to be filed need not state so many details.[213] In West Virginia the action of the majority of the directors may be valid without calling a regular meeting of the board;[214] under the New Jersey laws the directors can only act as a board in regular meetings.[215] In West Virginia the initial and annual tax is $410,[216] as against an initial fee of $200[217] and an annual tax of $1,000[218] in New Jersey.

[205] Del. Corp. Law, § 129.
[206] N. J. Corp. Act, § 114.
[207] Del. Franchise Tax Act 1901, § 4.
[208] N. J. P. L. 1901, p. 31.
[209] Spring Garden Bank v. Lumber Co., 32 W. Va. 357, 9 S. E. 243, 3 L. R. A. 583; Richardson v. Graham, 45 W. Va. 134, 30 S. E. 92.
[210] W. Va. Code, c. 54, § 23.
[211] Id. c. 53, § 49.
[212] N. J. Corp. Act, § 12.
[213] W. Va. Code, c. 32, § 89, as amended; Id. c. 53, § 46, as amended by Laws 1901, p. 98, c. 35; N. J. Corp. Act, § 43.
[214] W. Va. Code, c. 53, § 51, as amended by Laws 1901, p. 100, c. 35.
[215] Titus v. Railroad Co., 37 N. J. Law, 98.
[216] W. Va. Code, c. 32, § 87, as amended by Laws 1901, p. 112, c. 35.
[217] N. J. Corp. Act, § 114.
[218] N. J. P. L. 1901, p. 31.

§ 41c. The liberal features mentioned might incline our preference to West Virginia; but, on the other hand, no statute or decision is found permitting a voting trust in that state, and we are confronted with the same unpleasant inheritance tax [219] which the laws of Delaware require,[220] making no distinction between residents and nonresidents; though the tax is not as great as in Delaware, being only $2.50 on each $100 of appraised value, whereas in Delaware it is $5. A choice under these circumstances is somewhat difficult, but the author is rather inclined to still favor New Jersey for the particular purposes outlined.

§ 42. We are now brought to a comparison between the laws of *New York* and New Jersey, as between these two states must lie our final choice. New York adopted its present law after that of New Jersey had been for some time in practical operation, and borrowed from it many of its salutary provisions. Most of the advantages which would inure under the New Jersey law are to be found in New York also. Indeed, in New York stock may be issued for labor done,[221] which is not permitted under the New Jersey legislation. On the other hand, the stockholder in New York is subjected to the inheritance tax of that state,[222] which by incorporating in New Jersey he might escape.[223] But while he might escape the inheritance tax by seeking a New Jersey domicile, he would expose the corporation to a larger annual taxation than by procuring his franchise at home.[224] Moreover, it would seem that the fees paid to the state of New Jersey for the privilege of incorporating and conducting business in the state

[219] W. Va. Code, c. 32, § 51a (I).

[220] Del. Laws, vol. 13, c. 390, § 12.

[221] N. Y. S. C. L. § 42.

[222] In re Whiting's Estate, 150 N. Y. 27, 44 N. E. 715, 34 L. R. A. 232, 55 Am. St. Rep. 640; In re Bronson's Estate, 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238, 55 Am. St. Rep. 632.

[223] N. J. P. L. 1894, p. 318.

[224] N. J. P. L. 1901, p. 31.

of New York would be practically wasted, for the reason that these fees must be again paid in the state of New York as a condition of doing business there. The New York statute requires that a foreign business corporation shall within thirteen months after commencing its operations in that state pay to the state treasurer a license fee of one-eighth of 1 per centum of the amount of capital stock employed by it in New York during the first year of its business there, for the privilege of exercising its franchise in that state,[225] and in addition shall pay an annual tax similar to that paid by domestic corporations, to be computed upon the basis of the capital actually employed in New York.[226] A comparison of the expenses which must be paid by way of taxation for the first corporate year between two corporations, both doing business in New York and paying a 6 per cent. dividend, one of which incorporates in New Jersey and one in New York, is shown in the following tables:

§ 42a. **One Million Dollar Corporation Organized under New Jersey Laws.**

Initial incorporation fee	$ 200 00
Average fee for maintaining registered office in New Jersey	50 00
Annual franchise tax in New Jersey	1,000 00
License tax in New York for privilege of commencing business	1,250 00
Annual franchise tax in New York	1,500 00
Total	$4,000 00

Same Corporation Organized under New York Laws.

Initial incorporation fee	$ 500 00
Annual franchise tax	1,500 00
Total	$2,000 00

[225] N. Y. Tax Laws 1901, c. 558, § 181.

[226] Id. § 182; People v. Roberts, 155 N. Y. 408, 50 N. E. 53, 41 L. R. A. 228.

During the subsequent years of the existence of the corporation there would be, of course, no initial incorporation fee. The following table shows, therefore, the expense by way of taxation during every succeeding year:

Same Corporation Organized under New Jersey Laws.

Average fee for maintaining registered office in New Jersey	$ 50 00
Annual franchise tax in New Jersey	1,000 00
Annual franchise tax in New York	1,500 00
Total	$2,550 00

Same Corporation Organized under New York Laws.

Annual franchise tax	$1,500 00

§ 42b. This comparison discloses that the taxation for the first year of a New Jersey corporation doing business in New York would be twice as great as for the New York corporation, and for every year following almost twice as great. It has been admitted by the advocates of the New Jersey laws in preference to those of New York that the figures above given are correct if the laws are strictly enforced, but at the same time it is claimed that statistics of the state of New York show that in practice, because of the indifference of the officials or their inability to levy the proper taxes, the New Jersey corporation would not appear at such disadvantage. The answer to this must be that we are considering the law as it stands and as it should be enforced, not whether a given set of officials have or have not been able to gather together sufficient data up to this time to enable them to carry the provisions of the law into effect. Every new law must be administered with imperfect results, but as the administration becomes more perfect it will be easier to hold all foreign corporations to a stricter compliance with the requirements as set forth in the statute.

§ 42c. Aside from this, every corporation organizing elsewhere than in the state where it is to do business will very

soon realize the stringent laws generally prevailing relating to attachment. A nonresident is usually subject to attachment at the commencement of every suit at law based upon a money demand.[227] We have already seen that a corporation organized in a state other than that of its business habitat is classed as a nonresident.[228] It has, therefore, resulted that vexatious attachments have been frequently sued out against solvent corporations, based upon purely fictitious demands, asserted merely for the purpose of levying blackmail or forcing a compromise, to the very great detriment of the prosperity of these corporations. The force of these remarks was demonstrated by the frequency of such proceedings during the financial panic of 1893. This menace is sufficient in itself to outweigh many other great advantages which might be obtained by a foreign charter.

§ 42d. Our conclusion, therefore, is that, for the purposes suggested at the commencement of this chapter, the laws of the state of New York are best calculated to afford the protection and privileges desired.

§ 43. A good deal of space has been devoted to determining the state of the parentage of our suggested corporation, the purpose having been to indicate in a very general way only the line of reasoning to which resort must be had in order to correctly solve the problem in any given case. The author disclaims any purpose to prefer the New York laws over those of other jurisdictions in any case other than that stated at the outset of this chapter.

[227] 3 Clark & M. Corp. p. 2336; 4 Cyc. 430.
[228] Infra, § 15, and note.

CHAPTER II.

INCORPORATORS AND SUBSCRIPTIONS TO STOCK.

WHO MAY BE INCORPORATORS.

§ 44. At the outset counsel might be called upon to determine who may be incorporators under the laws of the particular jurisdiction chosen.

§ 45. Nonresidents.

In the preceding chapter we have considered briefly the general provisions of the various state laws relating to the residences of incorporators.

§ 46. Corporations.

While a corporation is frequently permitted *by statute* to hold stock in another corporation after that other corporation has once been organized, still it has been held that a corporation, in the absence of specific authority to that effect, cannot become an *incorporator* in another company.[1] It cannot even become

[1] Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14; Central R. Co. of New Jersey v. Railroad Co., 31 N. J. Eq. 475; Martin v. Stove

a stockholder in another company after incorporation unless allowed by charter or governing statute.[2]

§ 47. Infants.

A charter being in the nature of a contract between the individual incorporators and the state,[3] the same reasons that prevent an infant from entering into a binding contract prevent him from becoming an incorporator,[4] although, if it should happen that a corporation should be organized with one of its incorporators an infant, under the ordinary rule that a contract by an infant is not void, but voidable only by him, such a corporation might still have a legal existence.[5]

§ 48. Married Women.

Under the common law, married women, having no contractual power, could not become incorporators.[6] It is believed that there is now no state in which this common-law doctrine has not been changed by statute. Where a married woman is competent to contract as a feme sole there is no reason why she cannot become an incorporator.

§ 49. Aliens.

Based also upon the principles of the law of contracts, alien *enemies* cannot become incorporators;[7] but there is no com-

Co., 78 Ill. App. 105; McAlester Mfg. Co. v. Cotton & Iron Co., 128 Ala. 240, 30 South. 632; Smith v. Railroad Co., 8 Ohio Cir. Ct. R. 583; 1 Cook, Corp. § 64.

[2] De La Vergne Refrigerating Machine Co. v. Savings Inst., 175 U. S. 40, 20 Sup. Ct. 20, 44 L. Ed. 66.

[3] Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

[4] Phillips v. Bridge Co., 2 Metc. (Ky.) 219; 1 Cook, Corp. § 67; Matter of Globe Mut. Ben. Ass'n, 135 N. Y. 280, 284, 32 N. E. 122, 17 L. R. A. 547.

[5] In re Nassau Phosphate Co., 2 Ch. Div. 610.

[6] Witters v. Sowles (C. C.) 38 Fed. 700.

[7] 10 Cyc. 165, and cases cited.

mon-law restriction upon alien *friends* becoming so, even in those jurisdictions where the laws forbid the holding of real estate by aliens, and the only object of the corporation is to hold and convey real property.[8] This is because the corporation has an entirely different legal entity from the individuals organizing or holding stock in it. *The title to the property is in the corporation,* which, if it is not organized under a foreign law, is not considered an alien. The result of this principle is that, notwithstanding a state may prohibit the holding of real property by aliens, a number of persons, all of whom are aliens, might come to that state and take out a charter which would enable the corporation which they organize, and which they exclusively control, to acquire and hold such real estate as they see fit, and in this way the object of the law may be defeated. For this reason certain states have enacted legislation forbidding more than a certain percentage of stock to be held by aliens.[9]

Subscriptions for Stock.

§ 50. A formal subscription agreement is not necessary except in those states whose statutes require it as an essential step preliminary to the certificate of incorporation.[10] When such an agreement is requisite, if it is to bind the signers some care should be exercised in its preparation. The authorities are not in accord as to the binding force of such agreements prior to incorporation. Some courts have sustained them on the ground that the promise of each subscriber is the con-

[8] Princeton Min. Co. v. First Nat. Bank, 7 Mont. 530, 19 Pac. 210.

[9] Code Iowa, § 2889; Rev. St. Mo. § 4765; Const. Wash. art. 2, § 33; State v. Hudson Land Co. (Wash.) 52 Pac. 574, 40 L. R. A. 430; St. Wis. 1898, § 2200a.

[10] Manchester St. Ry. v. Williams, 71 N. H. 312, 52 Atl. 461; Parkhurst v. Railroad Co., 102 Ill. App. 507.

sideration for the promises of each of the others.[11] Other courts have taken the opposite view.[12]

§ 51. Prof. Collin's Rules.

The following rules laid down by Prof. Collin, of the Cornell Law School, it is believed state correctly the law generally prevailing:

§ 51a. "A preliminary agreement to form a corporation and take stock therein is not a contract by the subscribers with each other, and cannot be enforced by one or more against any other, but only by the corporation."

§ 51b. "Such an agreement, not made as a step authorized by statute in the process of forming the corporation, is a mere offer to the corporation not yet in existence, and is revocable by any subscriber until the birth of the corporation, which operates as an acceptance of the offer, and thereafter the subscription, if not previously revoked, is irrevocable, and may be enforced by the corporation."

§ 51c. "Such an agreement, made as a step authorized by statute in the process of forming the corporation, is made valid by the statute, and is binding upon each subscriber from the time of signing, and is irrevocable thereafter, but can be enforced only by the corporation."

[11] Higert v. Trustees, 53 Ind. 326; Conrad v. La Rue, 52 Mich. 83, 17 N. W. 706; Lathrop v. Knapp, 27 Wis. 214; Trustees of Troy Conference Academy v. Nelson, 24 Vt. 189; Christian College v. Hendley, 49 Cal. 347.

[12] Cottage St. M. E. Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286; Presbyterian Church of Albany v. Cooper, 112 N. Y. 517, 20 N. E. 352, 3 L. R. A. 468, 8 Am. St. Rep. 767; Hamilton College v. Stewart, 1 N. Y. 581; Twenty-Third St. Baptist Church v. Cornell, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807; Richelieu Hotel Co. v. Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; Kinsley v. Encampment Co., 41 Ill. App. 259; Ohio Wesleyan Female College v. Higgins, 16 Ohio St. 20; Johnson v. University, 41 Ohio St. 527; Whitsitt v. Trustees, 110 Ill. 125; McClure v. Wilson, 43 Ill. 356.

§ 51d. "An agreement to pay money to trustees, to be by them paid to a corporation thereafter to be created, the trustees to return to the subscribers stock in the corporation accordingly, is a valid contract between the subscribers and the trustees."

§ 51e. "The distinction made between a present subscription and an agreement to subscribe to the stock of a corporation thereafter to be created is unsound in principle, and disappears as mere dicta upon a thorough sifting of the cases."

§ 51f. "The damages recoverable by the corporation upon a subscription is the amount of the subscription; and all discussion of any other measure of damages, such as difference between par and market value of stock subscribed, arises from a misconception of the situation, and disappears from the net result of the authorities." [13]

§ 52. Requisites of Subscription Agreement.

In those states where such agreements have not been made valid by statute, it would seem that, in order to prevent the possibility of a subscriber legally withdrawing prior to the organization of the company, the agreement should be signed also by the promoters or trustees, with a covenant on their part to endeavor to obtain subscriptions up to a certain amount, and to organize the corporation as speedily as possible, and when organized to deliver to the subscribers stock in the company to the amount subscribed, in which event their promise would constitute a consideration for the promise of each of the subscribers.[14] In case the corporation has already been organized, and is thus legally competent to contract, a mere subscription agreement, without any covenant upon the part of the company, if under seal, would be valid in those jurisdictions

[13] 1 Cook, Corp. § 75.
[14] Clark & M. Corp. § 444.

where the common-law distinction between sealed and unsealed instruments prevails.[15]

§ 53. Uncertainty in Subscription Agreement.

In this connection attention should be called to a defect common to many subscription agreements otherwise beyond criticism. This consists in the failure to have them recite the par value of the stock for which the subscription is made. Frequently such documents contain a promise to subscribe for a certain number of the shares of the capital stock of a given corporation with a stated capital, without specifying into how many shares that capital is to be divided or the par value of each share. Such a contract would, of course, be void for uncertainty, it being impossible to determine the extent of the subscription.[16] Prudence would dictate that all of the features of the proposed corporation which are considered of particular moment should be plainly stated in the subscription agreement.

§ 54. Form of Subscription Agreement.

Whereas, it is proposed to organize under the laws of ..... a corporation to be styled (fill in proposed name), or to bear such other name as may hereafter be designated by the parties interested therein, the object of such corporation to be to transact the business of (fill in generally the nature of the business without specifying too minutely), with power to do all things which may seem calculated, directly or indirectly, to promote the business interests of said company; and

Whereas, it is proposed that said company shall have a capital stock of ..... ($.....) dollars, to be divided into (fill in number of preferred shares) shares of preferred stock and (fill in number of common shares) shares of common stock, of the par value of ..... ($.....) dollars each, and the undersigned parties each desire to become holders of stock in said corporation:

Now, therefore, we, the undersigned, in consideration of our mutual promises, do severally agree to and with each other, and with (fill in

[15] Id. §§ 440, 451c, and cases cited.

[16] Nemaha Coal & Mining Co. v. Little, 54 Kan. 424, 38 Pac. 483; Loutsenhizer v. Milling Co., 5 Colo. App. 479, 39 Pac. 66.

name of promoter or of trustees), who is actively interested in the formation of said corporation, to take the number and kind of shares of stock in said corporation set opposite our respective names as signed hereto, and to pay therefor the sum of ..... ($.....) dollars per share, such payments to be made at (fill in place of payment), on (state the time for making same, and whether they are to be in cash or in installments, and when these installments are to be called for); it being distinctly understood that upon payment in full for such shares we or our personal representatives or assigns are respectively to receive certificates of stock in said corporation to the amount of our subscriptions, and that meanwhile until payment shall be made in full said corporation shall issue to us its receipts for all payments made.

This agreement is conditioned upon the said (name of promoter or trustees) procuring other bona fide subscriptions of at least ..... ($.....) dollars to the said capital stock.

In testimony whereof we have hereunto set our hands and affixed our seals at ....., this ..... day of ....., A. D. 19...

Name.		Residence.	Number of Shares.	Kind of Shares.
John Doe,	[Seal.]	New York,	100 shares,	Preferred.
Richard Roe,	[Seal.]	Philadelphia,	" "	Common.
etc.	[Seal.]	etc.	etc.	etc.

In consideration of the foregoing subscriptions and each of them I (name of promoter or of trustees) hereby agree to and with the said subscribers and each of them to use my best endeavors to obtain subscriptions for the stock of said company to the extent of at least ..... ($.....) dollars, and to perfect the organization of said corporation as speedily as possible; and when organized to see that stock is delivered to said subscribers and each of them to the amount of their respective subscriptions.

In testimony whereof I have hereunto set my hand and affixed my seal at ....., this ..... day of ....., A. D. 19...

A. Promoter. [Seal.]

CHAPTER III.

CERTIFICATE OF INCORPORATION.

§ 55. How Corporate Franchise may be Conferred.

The corporate franchise may be conferred either by special legislation to suit the individual case, or by general legislation under which any persons desiring to obtain the corporate privilege may associate themselves together and secure this privilege as a matter of right.

§ 56. General Enabling Statutes.

There are two distinct methods recognized in the United States under general enabling statutes by which corporations may be organized: First, by application to a judicial tribunal which grants the charter; and, second, by a formal written agreement signed by the incorporators, which, upon being recorded in some designated office in the state, confers at once the right to be a corporation. The first method referred to is now so little in vogue that it need not be specially considered. Whenever it must be resorted to, the general principles applicable to the second method will also govern much of the procedure under the first.

§ 57. The Charter.

Under the second method the charter may consist either of the original agreement of incorporation signed by the various parties interested, which is now the general rule,[1] or it may consist of a certificate issued by some ministerial officer under the seal of the state, reciting that the incorporators have filed such an agreement, and have thereupon become a body corporate.[2] In either event the rights and privileges of the corporation are to be governed by this original agreement subscribed by the parties, in so far as it is not inconsistent with the law.[3]

[1] 10 Cyc. 222.

[2] Id.

[3] Id.; Clark & M. Corp. § 127; O'Brien v. Cummings, 13 Mo. App. 197.

§ 58. Source of Powers.

In order to determine the powers of a given corporation, resort must first be had to the Constitution of the state creating it; second, to the general law passed pursuant to the Constitution; and, third, to the charter itself. If the statute permitting the organization of corporations purports to confer broader powers than the Constitution warrants, the statute is to that extent unconstitutional and void. If the charter contains a statement of broader powers than are permitted by the Constitution or laws of the commonwealth, the charter is to that extent invalid.[4] It is not meant by this assertion that the corporation has not a legal existence, but merely that the excessive powers enumerated will be rejected as surplusage.[5]

§ 59. Assuming that the certificate of incorporation complies with both the Constitution and the general statute, this is the instrument to which resort must always be had primarily in order to determine the corporate powers. Hence the necessity for great care in framing this document.[6]

Contents of Certificate.

§ 60. The various state statutes prescribe with detail what must be stated in the certificate of incorporation. All of the required information should be incorporated in it. In addition, it is usually permissible to insert such other provisions, not contrary to law or public policy, as may be desired to govern the rights of the stockholders among themselves. No objection can reasonably be made to doing this. Each stockholder purchases his holdings with actual or constructive notice of the

[4] 10 Cyc. 1099; City of Aurora v. West, 9 Ind. 74; Republican Mountain Silver Mines v. Brown, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776; 1 Cook, Corp. §§ 2, 4.

[5] 1 Cook, Corp. § 4, and cases cited; Albright v. Association, 102 Pa. 411.

[6] Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950; Central Transp. Co. v. Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55.

extent of the powers of the company, and the manner in which those powers are to be exercised, and he can hardly be heard to object, therefore, to any of the stipulations to which, by becoming a stockholder, he has voluntarily made himself a party.[7]

§ 61. Governing Principles.

Generally the statutes specify so plainly what should be inserted that little is needed by way of explanation to make them clearer. There are, however, some principles of law which must be borne in mind in drafting every charter, and to a few of these principles a brief allusion will be made.

§ 62. Name.

In many states the appropriation of a name already assumed by another domestic corporation is forbidden by statute; but, aside from this, it is a general principle of law that a body which first acquires the right to use a particular corporate name will be protected in the use of that name as against any other body incorporating at a later period in the same state, and assuming the same name.[8] This is simply a particular expression of the broad equity doctrine that unfair competition in business will be enjoined by the courts. It has been held that, where there was already in existence a corporation styled "Kansas City Real Estate & Stock Exchange," registra-

[7] Eastern Plank Road Co. v. Vaughan, 14 N. Y. 546; Heck v McEwen, 12 Lea (Tenn.) 97; Rochester Ins. Co. v. Martin, 13 Minn. 59 (Gil. 54); Bates v. Wilson, 14 Colo. 140, 24 Pac. 99; Swartout v. Railroad Co., 24 Mich. 389; Bent v. Underdown, 156 Ind. 516, 60 N. E. 307; Heald v. Owen, 79 Iowa, 23, 44 N. W. 210; 3 Clark & M. Priv. Corp. §§ 1933, 1955, 1957, 1962, 2074–2076; Tayl. Priv. Corp. §§ 187, 448, 541; Kean v. Johnson, 9 N. J. Eq. 401; Loewenthal v. Reclaiming Co., 52 N. J. Eq. 440, 28 Atl. 454; Kent v. Mining Co., 78 N. Y. 159; Weatherly v. Society, 76 Ala. 567; Cummings v. Webster, 43 Me. 192; Union Bank of Louisiana v. Guice, 2 La. Ann. 249; Ernest v. Nicholls, 6 H. L. Cas. 401; 2 Cook, Corp. § 493.

[8] 1 Cook, Corp. § 15, and cases cited; 10 Cyc. 150, and cases cited.

tion should be refused a new corporation under the name of "The Kansas City Real Estate Exchange." [9] So, too, a mere transposition of words in the name has been held not to entitle a name so transposed to registration.[10] Authority is also found for the proposition that a new corporation cannot adopt the same name as an old one, with the mere addition of the place where the business is to be carried on.[11]

§ 63. Use of Word "Incorporated."

The statutes sometimes require the use of the word "incorporated," either in full or abbreviated, or the words "a corporation," after the name, wherever the name is displayed on printed matter or otherwise; and, as a penalty for noncompliance, the stockholders are held liable as partners.[12]

§ 64. Objects.

Two views have been taken by corporation lawyers with regard to stating in the charter the objects of the corporation. Some counsel prefer to set forth the objects in the most general terms possible, leaving the particular powers to be exercised to implication, upon the ground that every corporation has an implied power to do whatever is necessary to carry into effect the purposes of its creation, unless the doing of the particular thing is prohibited by law or by the charter.[13] In construing the doctrine of implied powers, the courts have

[9] State v. McGrath, 92 Mo. 355, 5 S. W. 29.

[10] Altoona Gas Co. v. Gas Co., 17 Pa. Co. Ct. R. 662.

[11] In re Bradley Fertilizer Co., 19 Pa. Co. Ct. R. 271; Glucose Sugar Refining Co. v. Sugar Refining Co. (N. J. Ch.) 22 N. J. Law J. 147.

[12] See chapter 1, § 2, Va. Corp. Law [2 Va. Code 1904, p. 523, § 1105a, subd. 2]; Gen. Corp. Law Nev. 1903, § 4; Gen. Corp. Law Del. 1901, § 5; Conn. Corp. Law 1903, § 2.

[13] Blanchard's Gun-Stock Turning Factory v. Warner, 1 Blatchf. 258, Fed. Cas. No. 1,521; 1 Clark & M. Corp. § 128; 10 Cyc. 1097, and cases cited.

decided that the acts which are authorized are not merely those which are indispensable and necessary to carry into effect the powers expressly recognized, but comprise all such as are appropriate, convenient, and suitable to this end. The very general expression of an object will therefore frequently be amply sufficient for all of the practical needs of the corporation. There is a danger in being more specific, in view of the doctrine that "inclusio unius est exclusio alterius." [14]

§ 65. On the other hand, other counsel, quite as learned, consider that it is dangerous to leave to implication any of the powers of a corporation, or, if not dangerous, for the benefit of the investing public it is better to express them in detail, so that a glance at the charter may determine absolutely and beyond question whether or not a particular act is authorized. The best expression of this view is found in the language of Mr. Dill, the eminent corporation lawyer, who says in his treatise on the Corporation Law of New Jersey, at page 21:

§ 65a. "This being the important part of the certificate of incorporation, great care should be taken that the objects and purposes of the company are stated in the fullest and clearest manner possible, because the company cannot undertake any business not authorized by its charter, and not even the fullest sanction given by the shareholders will make valid an act which is outside the powers of the company. Directors undertaking any such business may become personally liable for loss, and great inconvenience follows from companies having too limited powers. It is often questioned how far it is necessary to detail in extenso in the certificate of incorporation the powers of the company. The answer is plain.

§ 65b. "The balance of disadvantage decidedly attaches to too narrowly defined objects.

§ 65c. "It is easier to compress, so to speak, the business of a company within the limits of large objects and broad pow-

[14] Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950.

ers, than to develop business by extension in the face of narrowly defined objects. It is better to give latitude to the objects and powers as contained in the certificate of incorporation, and to limit the powers of directors by the by-laws, than to run the risk of the subsequent insertion in the by-laws or in the minutes of the board of directors of a provision intended to meet some pressing requirements of the business, which provision may be found absolutely worthless because of variations from the terms of the certificate of incorporation.

§ 65d. "It is customary to insert general words, such as, 'In general, to carry on any other business, whether manufacturing or otherwise.' But it must be understood that the courts limit such words to operations of a nature similar to the business previously mentioned, and will not include any wholly fresh business."

Powers.

§ 66. In order to prevent the application of the principle above referred to,[15] that the inclusion of certain powers means the exclusion of others, it is usual among those who draft certificates of incorporation, when stating the powers which the company may exercise in addition to the previously stated objects, to preface such enumeration with the following words, or those substantially similar: "In furtherance of, and not in limitation of, the general powers conferred by law, and of the objects and purposes as hereinabove stated, it is hereby expressly provided that the company shall also have the following powers; that is to say," etc.

§ 67. Many of the powers usually inserted after this language are merely what the law would confer without any express words. Some of the clauses, however, frequently contained in this portion of corporation charters, deserve consideration.

[15] Supra, § 64.

§ 68. To Conduct Business in Other States.

Some of the early statutes in certain portions of this country seemed, at least by implication, to require that, if a corporation should desire to do business outside of the state of its creation, that power should be stated in its charter. Hence the practice sprung up, and has since continued, of inserting in the certificate of incorporation a clause in terms permitting it to conduct its business and hold and convey property of every description elsewhere than in the state of its birth. This clause is probably a prudent one, but it should not be so worded as to exclude the power of doing these things within the parent state, for then the corporation would be declared illegal ab initio under the principle heretofore referred to.[16]

§ 69. To Create Voting Trusts.

The legality of voting trusts will be discussed in another portion of this work.[17] From the tenor of certain judicial utterances, it is believed that a voting trust which might otherwise be declared illegal would be sustained if the charter contains a provision authorizing it.[18] In some states voting trusts are made legal by statute, whether referred to in the charter or not,[19] and in still others they have been sustained by the courts without aid either from the statute or charter.[20]

§ 70. To Cumulate Votes.

In some states, as in New York[21] and New Jersey,[22] the law requires the provision permitting cumulative voting to be inserted in the charter, if this right is to be exercised.

[16] Land Grant Ry. & Trust Co. v. Coffey County, 6 Kan. 245.
[17] Infra, § 213.
[18] White v. Tire Co., 52 N. J. Eq. 178, 28 Atl. 75.
[19] Pa. Act May 7, 1889; N. Y. Inc. Law 1901, c. 355.
[20] Infra, §§ 213a–213b.
[21] N. Y. G. C. L. § 20.
[22] N. J. Pam. L. 1900, p. 418.

§ 71. Directors Disposing of Entire Property.

At common law, if the board of directors should desire to divert the entire property of a perfectly solvent company from the business for which it was organized, or to dispose of it, a minority of the stockholders might prevent this.[23] Therefore, where it is desired to lodge a greater degree of power in the directors than would otherwise exist, it is customary in the charter to specify these powers, and among them the right to dispose of the entire property of the company upon the conditions and in the manner specifically appearing in the certificate of incorporation. The charter being considered in the light of a contract between the stockholders,[24] such a provision would place the minority in a position from which it would be very difficult to successfully assail the action of the directors in so disposing of the assets.

§ 72. Holding Directors' Meetings Outside of the State.

In certain states this is expressly permitted by statute.[25] In others it is only permitted by statute where the power is stated in the charter or by-laws.[26] Where the statute is silent on the subject, the common-law rule governs. What this rule is, is somewhat difficult to decide from the adjudged cases. Mr. Cook, in his treatise on Corporation Law, lays down the law as follows:[27] "A meeting of the directors of a corporation may be held outside of the state creating the corporation, unless the charter or a statute expressly forbids such a meeting. The acts, proceedings, and contracts of a meeting of the

[23] See Chicago City R. Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. Ed. 902.

[24] See supra, § 60, and note.

[25] Rev. St. Me. 1904, c. 47, § 19; B. C. L. Mass. 1903, c. 437, § 25; N. Y. Laws 1904, c. 446, § 2; Gen. Inc. Act Va. c. 5, § 5 [1 Va. Code 1904, p. 558, § 1105e, subd. 5]; W. Va. Code, c. 54, § 23; Rev. Civ. Code S. D. § 786; Nev. Gen. Inc. Law 1903, §§ 14, 23.

[26] N. J. Corp. Act, § 44; Del. Corp. Law 1901, § 32; Civ. Code Porto Rico, tit. 2, c. 1, § 41.

[27] 2 Cook, Corp. § 713a.

board of directors held outside of the state are valid and enforceable." The late Judge Seymour D. Thompson, in his latest treatise on Corporations, contained in 10 Cyclopedia of Law & Procedure, states the rule to be diametrically opposite: "In the absence of statutory authorization for a different course, no valid meeting of directors can be held outside the state under whose legislation the corporation has been created." [28]

§ 72a. In the case of Galveston, H. & H. R. Co. v. Cowdrey (1870) 11 Wall. 459, 20 L. Ed. 199, the Supreme Court of the United States held that bona fide holders of railroad bonds cannot be prejudiced by the fact that the mortgage by which they were secured was authorized at a meeting of the board of directors held outside of the state which conferred the charter privileges. The court uses the following language: [29]

§ 72b. "No doubt, it may be true in many cases that the extraterritorial acts of directors would be held void, as in the case cited from the 14th New Jersey Chancery Reports, 383,* where a set of directors of a New Jersey corporation met in Philadelphia, against a positive prohibitory statute of New Jersey, and improperly voted themselves certain shares of stock. And other cases might be put where their acts would be held void without a prohibitory statute, and it is generally true that a corporation exists only within the territory of the jurisdiction that created it. But it is well settled that a corporation may, by its agents, make contracts and transact business in another territory, and may sue and be sued therein. It may hold land in another territory so long as the local authorities do not object. And we see no reason why it should not be estopped by the action of its directors in another territory, when the action is the basis of negotiations by which third parties have bona fide parted with their money, and the company has received the benefits of the transaction. A contrary doctrine would

[28] Page 783. [29] Page 476. * Hilles v. Parrish.

authorize a company to take advantage of its own wrong, and would seriously impair the negotiability and value of such securities."

§ 72c. This opinion hints at a distinction which seems to be drawn by some of the cases between "constituent acts" and mere ministerial acts, with respect to which the directors are deemed to be ordinary agents of the corporation; the former, in the absence of an enabling statute, being required to be performed within the parent state, while the latter may be done anywhere.[30] Instances of the latter class of acts would be appointing a secretary,[31] or conferring power upon an agent to execute a deed.[32] As to this class of acts, there can be no question but that, even in the absence of statutory authority, if the power to directors to meet outside of the state is contained in the charter, no one can be heard to raise the objection.[33] As to the former class, while certain decisions have thrown some doubt upon the proposition, the insertion of this power in the certificate of incorporation can do no harm, and would probably make valid, at least as among the members of the corporation themselves, any act otherwise lawful which might be sanctioned by the board of directors through a resolution passed outside of the state.

§ 73. Action of Directors Not Assembled in Meeting.

The corporation law of West Virginia, as well as that of Nevada, prescribes that the action of a majority of the board of directors, although not at a regularly called meeting, if assented to in writing by all of the other members of the board, shall always be as valid and effective in all respects as if

[30] Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. Ed. 199; Aspinwall v. Railroad Co., 20 Ind. 492, 83 Am. Dec. 329; Reichwald v. Hotel Co., 106 Ill. 439; 3 Clark & M. Corp. § 679b.

[31] McCall v. Manufacturing Co., 6 Conn. 428.

[32] Arms v. Conant, 36 Vt. 744.

[33] 3 Clark & M. Corp. § 679b.

passed by the board in regular meeting assembled.[34] This gives legislative sanction to a practice sometimes indulged in, but which, without some specific authority for it, is illegal.[35] The reason why the directors are required to meet and confer is that they are acting as trustees for the interests of the stockholding body at large. They are constituted a board in order that they may deliberate, and each director have the benefit of the views pro and con of every other director. When acting outside of a meeting this interchange of views cannot usually be had, and the interests of the stockholders are to that extent prejudiced. Nevertheless it has been found very desirable in many cases where a quorum of the board cannot be obtained because of absence of certain members, or for other causes, and where the matter to be authorized is one so clearly expedient as to leave little doubt of its wisdom, to have the power to take the action of the board by obtaining the individual assent of the various members in writing. Should such a provision be inserted in the charter of a corporation, it is not conceived that any one could take exception to this method of procedure. Certainly no stockholder who purchased stock with the full knowledge that the practice had been sanctioned could be heard to complain, and no one else would be in a position to criticise this mode of action.[36] In many recent charters, therefore, such a clause has been inserted.

§ 74. Power to Regulate Inspection of Records.

At common law the stockholders of a corporation had a right to examine at reasonable times the books and records of the company.[37] This right has often been availed of by

[34] W. Va. Code, c. 53, § 51, amended by Acts 1901, c. 35; Gen. Corp. Law Nev. 1903, §§ 23, 111.

[35] Kansas City Hay Press Co. v. Devol (C. C.) 72 Fed. 717; 3 Clark & M. Corp. § 677; 10 Cyc. 774, 775.

[36] Supra, § 60, n. 7; 3 Clark & M. Corp. § 677.

[37] Ranger v. Cotton Press Co. (C. C.) 51 Fed. 61; 2 Clark & M. Corp. §§ 530, 531; 2 Cook, Corp. § 511; 10 Cyc. 954.

persons interested in a rival business, who, merely for the purpose of ascertaining the trade secrets of a competitor, have purchased a few shares of stock in such competing company.[38] To remedy this mischief, charters are frequently drawn with a clause empowering the directors to determine from time to time the conditions under which such inspection will be permitted, and forbidding the examination of the books by any stockholder except in compliance with these rules.[39]

§ 75. Directors Making and Amending By-Laws.

By-laws are usually adopted and amended by the stockholders in meeting assembled. They are enacted to define and limit the powers of directors and officers. It is contrary to the general practice to confer the right to make and amend by-laws upon the directors.[40] There is no reason, however, why this may not be done, if the incorporators or stockholders see fit to do so.[41] In fact, the statutes in some jurisdictions confer this power upon the directors alone, as in the District of Columbia;[42] and in other jurisdictions, as in New Jersey,[43] Delaware,[44] and Porto Rico,[45] the directors may be given this power if so specified in the charter. In states where it is not contrary to the policy of the law to vest a right of this magnitude in the directors, it may be thought desirable to insert such provisions in the certificate of incorporation. It is a power which is apt to be dangerous to the rights of the minority stockholders.

[38] Heminway v. Heminway, 58 Conn. 443, 19 Atl. 766; State ex rel. O'Hara v. Biscuit Co., 69 N. J. Law, 198, 54 Atl. 241.

[39] See Dill, N. J. Corp., page facing page 64.

[40] 3 Clark & M. Corp. § 641; 10 Cyc. 353; 1 Cook, Corp. § 4a.

[41] Id.; 10 Cyc. 354.

[42] D. C. Code, § 612.

[43] G. C. L. N. J. § 11.

[44] Gen. Corp. Law Del. § 12.

[45] Civ. Code Porto Rico, tit. 2, c. 1, § 39.

§ 76. **Executive Committee.**

In large corporations, having a great number of directors, it has been found convenient to delegate all the powers of the board to an executive committee, which shall, between the meetings of the board, exercise all the powers of the latter. This device is of frequent occurrence when it is sought to place the control of large corporate interests in the hands of a small coterie of interested persons. In the absence of a statute, charter provisions, or general governing custom authorizing it, it has been held that there is no warrant for the delegation by the directors of any of their discretionary powers to an executive committee.[46] Merely ministerial powers can be so delegated.[47] If, however, the certificate of incorporation contains a clause authorizing an executive committee and defining its powers, it appears to be legal, even to the extent of discretionary acts.[48]

§ 77. Some of the features to which attention has been called above may be contained either in the by-laws or in the charter. Great differences in practical result may depend upon whether these matters are inserted in the charter or the by-laws. It is usually much more difficult to amend a charter than to change a by-law. A charter provision inserted for the benefit of minority stockholders affords much more adequate protection to them, therefore, than the self-same provision appearing in the by-laws merely.[49]

Capital Stock.

§ 78. The capital stock must, of course, be limited to such an amount as is warranted by law. The charter should show the amount, the number of shares into which it is to be divided,

[46] See on this subject, 2 Cook, Corp. § 715; 10 Cyc. 772.

[47] Id.; see Metropolitan Telephone & Telegraph Co. v. Telegraph & Telephone Co., 44 N. J. Eq. 568, 14 Atl. 907.

[48] Id.

[49] Loewenthal v. Reclaiming Co., 52 N. J. Eq. 440, 28 Atl. 454.

and the par value of each share, although in certain portions of the United States the exact amount of capital stock need not be specified in the charter.[50]

§ 78a. In fixing upon the amount of capital stock, several points should be taken into consideration. Inasmuch as the capital of a given corporation may be fixed at a large amount, and the company start in business with but a small portion of it actually paid in, the temptation is great with many promoters to inflate the importance and solidity of the corporation in the eyes of the public by establishing the capital at a high figure. This is sometimes done not merely for this reason, but to permit the issuing of such increased amounts of stock from time to time as the needs of the business may seem to demand, without the necessity for resorting to an amendment of the charter. But the effect of the tax laws must be given due attention in this respect. In some states the initial and annual taxation is based upon the amount of stock, not actually issued and outstanding, but *authorized*,[51] in which event it would be worse than foolish to fix the authorized capital at an amount largely in excess of that which will be required for the needs of the present, and the immediate future. Not only must the laws of the parent state be examined and considered, but also the laws of every other state or jurisdiction where the corporation proposes to do business. A tax may be imposed as a condition of admitting the corporation to do business in another state, based upon the *authorized* capital, although in the parent state the basis is the capital issued and outstanding.

§ 78b. The different classes of stock which are to be issued, and the amounts of each class, respectively, should be stated in the certificate of incorporation. There is no necessity for a special statute conferring the right, upon the incorporation of a company, to create preferred stock.[52] Where

[50] 1 Cook, Corp. § 182.

[51] W. Va. Code, c. 32, § 87, as amended by Acts 1903, c. 3.

[52] 1 Cook, Corp. § 268.

such stock is authorized, the preferences should plainly appear upon the face of the charter; the character of the preferences, both as to dividends and on the dissolution of the company, being explicitly stated. The nature of preferences, and manner of stating them, will be treated in a subsequent chapter of this work.[53] Where the dividends on preferred stock are limited by statute to a certain amount, this amount should, of course, not be exceeded.

Names and Residences of Incorporators.

§ 79. There is a distinction between statutes which require the names and *residences* of incorporators to be stated in the certificate of incorporation, and those which require merely the names and *post-office addresses* of the incorporators to be so set forth. Where the latter only are required, the post-office address may be given in the care of any person far removed from the domicile, and there need be nothing to advise the tax authorities of the actual place of residence of any interest the various incorporators may have in the company.[54]

Number of Shares Subscribed.

§ 80. In certain states where the liability of stockholders is limited to the amount unpaid on the original *subscription,* and no particular amount of stock is required to be subscribed as a condition precedent to obtaining the charter or to engaging in business, it is customary to have each incorporator subscribe for one share only. He can afterwards purchase as much more stock as he pleases, but there will be no liability beyond the amount unpaid on the one share for which subscription was originally made.

[53] Infra. §§ 172–176.
[54] Dill, N. J. Corp. p. 23.

Existence of Corporation.

§ 81. Where a corporation can be made of unlimited duration, it is generally better to state its corporate life as perpetual. This will avoid the necessity of renewing the charter at the expiration of the time which would be otherwise limited in the certificate.

Signatures.

§ 82. After the certificate of incorporation has been properly drawn, it must, of course, be signed by the statutory number of persons. Where the law requires all directors to be stockholders, and that the directors for the first year shall be named in the certificate, and does not require any reference to the amount subscribed by each incorporator, it is safer to have each director sign as an incorporator, although the number of signers may be more than the minimum number of incorporators specified in the statute. The reason for this is that the certificate then shows on its face, prima facie, that the directors named are interested financially in the company. A better way still, however, is to have the amount subscribed by each incorporator inserted in the certificate, although not required by statute. Sometimes, though, practical objections to doing this may exist.

Acknowledgment.

§ 83. The acknowledgments of the incorporators should be taken before an officer authorized by the law of the parent state to take such acknowledgments, and should be in the form required by the laws of that state. It is generally required, where the acknowledgment is taken outside the limits of that state, that the notary's official signature and seal should be authenticated by the clerk of the court of the county where the acknowledgment is taken, but this is not universal.

Forms of Charter, Object Clauses, Clauses Regulating Business, Etc.

§ 84. Rather than attempt to submit to the reader a form of charter, which, by filling in certain blanks, he may adapt to his own purposes, it has seemed to the author better to insert a certificate of incorporation prepared by most eminent counsel for one of the largest corporations ever organized under the laws of the state of New Jersey. This can easily be modified to meet the needs of any corporation. In order, however, that there may be some guide to those who desire to organize a corporation having different objects in view, and who wish to confer other powers than those permitted by the charter referred to, additional object clauses are appended to this chapter, as well as certain clauses regulating the methods of doing business somewhat differently than are found in the model given.

§ 84a. The following cases contain instructive comments as to the advantages of inserting such clauses: Peruvian Railways Co. v. Thames & Mersey M. I. Co., 2 Ch. Div. 617; Ernest v. Nicholls, 6 H. L. Cas. 401; Overend, Gurney & Co. v. Gibbs, L. R. 5 Eng. & Irish App. 480. Many other similar clauses will be found in the very complete work edited by James B. Dill, Esq., on New Jersey Corporations.

§ 84b. Amended Certificate of Incorporation of United States Steel Corporation.

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the act of the Legislature of the state of New Jersey, entitled "An act concerning corporations (Revision of 1896)," and the acts amendatory thereof and supplemental thereto, do hereby certify as follows:

I. The name of the corporation is "United States Steel Corporation."

II. The location of its principal office in the state of New Jersey is at No. 51 Newark street, in the city of Hoboken, county of Hudson. The name of the agent therein and in charge thereof, upon whom process against the corporation may be served, is Hudson Trust Company. Said office is to be the registered office of said corporation.

III. The objects for which the corporation is formed are:

To manufacture iron, steel, manganese, coke, copper, lumber and other materials, and all or any articles consisting, or partly consisting, of iron, steel, copper, wood or other materials, and all or any products thereof.

To acquire, own, lease, occupy, use or develop any lands containing coal or iron, manganese, stone or other ores, or oil, and any wood lands, or other lands for any purpose of the company.

To mine, or otherwise to extract or remove coal, ores, stone and other minerals and timber from any lands owned, acquired, leased or occupied by the company, or from any other lands.

To buy and sell, or otherwise to deal or to traffic in, iron, steel, manganese, copper, stone, ores, coal, coke, wood, lumber and other materials, and any of the products thereof, and any articles consisting, or partly consisting thereof.

To construct bridges, buildings, machinery, ships, boats, engines, cars and other equipment, railroads, docks, slips, elevators, water works, gas works and electric works, viaducts, aqueducts, canals and other waterways, and any other means of transportation, and to sell the same, or otherwise to dispose thereof, or to maintain and operate the same, except that the company shall not maintain or operate any railroad or canal in the state of New Jersey.

To apply for, obtain, register, purchase, lease, or otherwise to acquire, and to hold, use, own, operate and introduce, and to sell, assign, or otherwise to dispose of, any trade marks, trade names, patents, inventions, improvements and processes used in connection with, or secured under letters patent of the United States, or elsewhere, or otherwise; and to use, exercise, develop, grant licenses in respect of, or otherwise to turn to account any such trade-marks, patents, licenses, processes, and the like, or any such property or rights.

To engage in any other manufacturing, mining, construction or transportation business of any kind or character whatsoever, and to that end to acquire, hold, own and dispose of any and all property, assets, stocks, bonds and rights of any and every kind; but not to engage in any business hereunder which shall require the exercise of the right of eminent domain within the state of New Jersey.

To acquire by purchase, subscription or otherwise, and to hold or to dispose of, stocks, bonds or any other obligations of any corporation formed for or then or theretofore engaged in or pursuing, any one or more of the kinds of business, purposes, objects or operations above indicated, or owning or holding any property of any kind herein mentioned; or of any corporation owning or holding the stocks or the obligations of any such corporation.

To hold for investment, or otherwise to use, sell or dispose of, any

stock, bonds or other obligations of any such other corporation; to aid in any manner any corporation whose stock, bonds or other obligations are held or are in any manner guaranteed by the company, and to do any other acts or things for the preservation, protection, improvement or enhancement of the value of any such stock, bonds or other obligations, or to do any acts or things designed for any such purpose; and, while owner of any such stock, bonds or other obligations, to exercise all the rights, powers and privileges of ownership thereof, and to exercise any and all voting power thereon.

The business or purpose of the company is from time to time to do any one or more of the acts and things herein set forth; and it may conduct its business in other states and in the territories and foreign countries, and may have one office or more than one office, and keep the books of the company outside of the state of New Jersey, except as otherwise may be provided by law; and may hold, purchase, mortgage and convey real and personal property either in or out of the state of New Jersey.

Without in any particular limiting any of the objects and powers of the corporation, it is hereby expressly declared and provided that the corporations shall have power to issue bonds and other obligations, in payment for property purchased or acquired by it, or for any other object in or about its business; to mortgage or pledge any stocks, bonds or other obligations, or any property which may be acquired by it, to secure any bonds or other obligations by it issued or incurred; to guarantee any dividends or bonds or contracts or other obligations; to make and perform contracts of any kind and description; and in carrying on its business, or for the purpose of attaining or furthering any of its objects, to do any and all other acts and things, and to exercise any and all other powers which a copartnership or natural person could do and exercise, and which now or hereafter may be authorized by law.

IV. The total authorized capital stock of the corporation is eleven hundred million dollars ($1,100,000,000), divided into eleven million shares of the par value of one hundred dollars each. Of such total authorized capital stock, five million five hundred thousand shares, amounting to five hundred and fifty million dollars, shall be preferred stock, and five million five hundred thousand shares, amounting to five hundred and fifty million dollars, shall be common stock.

From time to time, the preferred stock and the common stock may be increased according to law, and may be issued in such amounts and proportions as shall be determined by the board of directors, and as may be permitted by law.

The holders of the preferred stock shall be entitled to receive when and as declared, from the surplus or net profits of the corporation,

yearly dividends at the rate of seven per centum per annum, and no more, payable quarterly on dates to be fixed by the by-laws. The dividends on the preferred stock shall be cumulative, and shall be payable before any dividend on the common stock shall be paid or set apart: so that, if any year dividends amounting to seven per cent. shall not have been paid thereon, the deficiency shall be payable before any dividends shall be paid upon or set apart for the common stock.

Whenever all cumulative dividends on the preferred stock for all previous years shall have been declared and shall have become payable, and the accrued quarterly installments for the current year shall have been declared, and the company shall have paid such cumulative dividends for previous years and such accrued quarterly installments, or shall have set aside from its surplus or net profits a sum sufficient for the payment thereof, the board of directors may declare dividends on the common stock, payable then or thereafter, out of any remaining surplus or net profits.

In the event of any liquidation or dissolution or winding up (whether voluntary or involuntary) of the corporation, the holders of the preferred stock shall be entitled to be paid in full both the par amount of their shares, and the unpaid dividends accrued thereon before any amount shall be paid to the holders of the common stock; and after the payment to the holders of the preferred stock of its par value, and the unpaid accrued dividends thereon, the remaining assets and funds shall be divided and paid to the holders of the common stock according to their respective shares.

V. The names and post-office addresses of the incorporators, and the number of shares of stock for which severally and respectively we do hereby subscribe (the aggregate of our said subscriptions, being three thousand dollars, is the amount of capital stock with which the corporation will commence business), are as follows:

Name.	Post Office Address.	Number of Shares.	
		Preferred Stock.	Common Stock.
Charles C. Cluff.....	51 Newark Street, Hoboken, New Jersey.....	5	5
William J. Curtis.....	Ditto.	5	5
Charles MacVeagh.....	Ditto.	5	5

VI. The duration of the corporation shall be perpetual.

VII. The number of directors of the company shall be fixed from time to time by the by-laws; but the number if fixed at more than three, shall be some multiple of three. The directors shall be classified with respect to the time for which they shall severally hold office by dividing them into three classes, each consisting of one-third of the whole number of the board of directors. The directors of the first class shall be elected for a term of one year; the directors of the second class for a term of two years; and the directors of the third class for a term of three years; and at each annual election the successors to the class of directors whose terms shall expire in that year shall be elected to hold office for the term of three years, so that the term of office of one class of directors shall expire in each year.

The number of the directors may be increased as may be provided in the by-laws. In case of any increase of the number of the directors the additional directors shall be elected as may be provided in the by-laws, by the directors or by the stockholders at an annual or special meeting, and one-third of their number shall be elected for the then unexpired portion of the term of the directors of the first class, one-third of their number for the unexpired portion of the term of the directors of the second class, and one-third of their number for the unexpired portion of the term of the directors of the third class, so that each class of directors shall be increased equally.

In case of any vacancy in any class of directors through death, resignation, disqualification or other cause, the remaining directors, by affirmative vote of a majority of the board of directors, may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, and until the election of a successor.

The board of directors shall have power to hold their meetings outside of the state of New Jersey at such places as from time to time may be designated by the by-laws or by resolution of the board. The by-laws may prescribe the number of directors necessary to constitute a quorum of the board of directors, which number may be less than a majority of the whole number of the directors.

Unless authorized by votes given in person or by proxy by stockholders holding at least two-thirds of the capital stock of the corporation, which is represented and voted upon in person or by proxy at a meeting specially called for that purpose or at an annual meeting, the board of directors shall not mortgage or pledge any of its real property, or any shares of the capital stock of any other corporation; but this prohibition shall not be construed to apply to the execution of any purchase-money mortgage or any other purchase-money lien. As authorized by the act of the Legislature of the state

of New Jersey passed March 22, 1901, amending the 17th section of the act concerning corporations (Revision of 1896), any action which theretofore required the consent of the holders of two-thirds of the stock at any meeting after notice to them given, or required their consent in writing to be filed, may be taken upon the consent of, and the consent given and filed by the holders of two-thirds of the stock of each class represented at such meeting in person or by proxy.

Any officer elected or appointed by the board of directors may be removed at any time by the affirmative vote of a majority of the whole board of directors. Any other officer or employé of the Company may be removed at any time by vote of the board of directors, or by any committee or superior officer upon whom such power of removal may be conferred by the by-laws or by vote of the board of directors.

The board of directors, by the affirmative vote of a majority of the whole board, may appoint from the directors an executive committee, of which a majority shall constitute a quorum; and to such extent as shall be provided in the by-laws, such committee shall have and may exercise all or any of the powers of the board of directors, including power to cause the seal of the corporation to be affixed to all papers that may require it.

The board of directors, by the affirmative vote of a majority of the whole board, may appoint any other standing committees, and such standing committees shall have and may exercise such powers as shall be conferred or authorized by the by-laws.

The board of directors may appoint not only other officers of the company, but also one or more vice-presidents, one or more assistant treasurers and one or more assistant secretaries; and, to the extent provided in the by-laws, the persons so appointed respectively shall have and may exercise all the powers of the president, of the treasurer and of the secretary, respectively.

The board of directors shall have power from time to time to fix and to determine and to vary the amount of the working capital of the company; and to direct and determine the use and disposition of any surplus or net profits over and above the capital stock paid in; and in its discretion the board of directors may use and apply any such surplus or accumulated profits in purchasing or acquiring its bonds or other obligations, or shares of its own capital stock, to such extent and in such manner and upon such terms as the board of directors shall deem expedient; but shares of such capital stock so purchased or acquired may be resold, unless such shares shall have been retired for the purpose of decreasing the company's capital stock as provided by law.

The board of directors from time to time shall determine whether and to what extent, and at what times and places, and under what conditions and regulations, the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any account or book or document of the corporation, except as conferred by statute or authorized by the board of directors, or by a resolution of the stockholders.

Subject always to by-laws made by the stockholders, the board of directors may make by-laws, and, from time to time, may alter, amend or repeal any by-laws; but any by-laws made by the board of directors may be altered or repealed by the stockholders at any annual meeting, or at any special meeting, provided notice of such proposed alteration or repeal be included in the notice of the meeting.

In witness whereof, we have hereunto set our hands and seals the 23rd day of February, 1901.

Charles C. Cluff. [L. S.]
William J. Curtis. [L. S.]
Charles MacVeagh. [L. S.]

Signed, sealed and delivered in the presence of
Francis Lynde Stetson.
Victor Morawetz.

State of New Jersey, } ss.:
County of Hudson, }

Be it remembered that on this 23rd day of February, 1901, before the undersigned, personally appeared Charles C. Cluff, William J. Curtis and Charles MacVeagh, who, I am satisfied, are the persons named in and who executed the foregoing certificate; and I having first made known to them and to each of them, the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

Geo. Holmes,
Master in Chancery of New Jersey.

[10ct. Internal Revenue Stamp Cancelled.]

Indorsed: "Received in the Hudson Co. N. J. Clerk's Office Feb'y 25th A. D. 1901 and Recorded in Clerk's Record No. —— on Page ——. Maurice J. Stack, Clerk."

Indorsed: "Filed Feb. 25, 1901. George Wurts, Secretary of State."

Indorsed: "Filed April 1, 1901. George Wurts, Secretary of State."

Object Clauses.

§ 84c. Mercantile Business (Dry Goods, Notions, Etc.).

To establish and carry on all or any part of the business of manufacturing, importing, exporting, buying and selling, either as whole-

sale or retail merchants or both, any or all of the following classes of merchandise, to wit: Dry goods, notions, boots and shoes, hats, and wearing apparel generally, linen and cotton goods, silks, furs, laces, and generally and without limitation all articles of merchandise usually sold or which may conveniently be sold in connection with any of the merchandise hereinabove referred to.

§ 84d. Department Store.

To establish and conduct a department store, with any and all branches usually incident thereto, and to this end:

(1) To carry on, both wholesale and retail, the whole or any portion of the businesses of manufacturing, importing, exporting, and buying and selling generally, dry goods, furs, haberdasherie, hosiery and textile fabrics of all kinds; millinery, garments, and wearing apparel generally; linens, laces, feathers, leather goods, furniture, iron ware, china and glass ware, crockery, and other household fittings and utensils, bric-a-brac and ornaments generally; stationery, notions, and fancy goods; hardware, jewelry, gold and silver and plated ware, watches, and precious stones; meats and provisions generally; drugs, chemicals, perfumery, soap, and toilet articles generally; books, papers, magazines, musical instruments, bicycles, and tricycles, boats, motor vehicles of all kinds, coaches, carriages, saddlery and harness, and sporting goods; coal and wood; also wines, liquors, mineral, aerated and other waters, cigars and tobacco and refreshments generally, as well as produce of any and all kinds; milk, cream, butter, eggs and cheese, and dairymen's products generally; flowers, birds, and domestic animals; photographs and photographers' supplies generally; and, without limitation, all natural products, and all manufactured goods and materials; as well as all other things which are usually or which may be properly dealt with in a department store.

(2) To alter, repair, exchange, store, transport, hire, or lease any of the articles or things hereinabove mentioned; and to make and carry out contracts with reference thereto; and to print such advertising and other literature as may properly be used as an adjunct to a department store.

(3) To establish and conduct cafés, soda fountains, reading and writing rooms, retiring rooms, lounging rooms, dressing rooms, telephones, and other conveniences for the use of customers and others.

(4) To permit other persons or corporations to carry on any kind of business on the premises of this corporation on such terms as to it may seem expedient and proper.

§ 84e. Contracting Company.

To establish and conduct the business of contracting and construction in all of its branches, and to this end to execute, deliver and carry out contracts for building, fitting up, reconstructing, altering, improving, decorating, furnishing and removing all kinds of buildings and structures; contracts for earthwork generally above and below ground, for water works and courses, hydraulic works, and for the building of piers, wharves and docks; for draining and reclaiming lands either totally or partially covered by water; and all other contracts of whatsoever kind which are usually or which may properly be incident to the business aforesaid; and for the more effectual prosecution of such business, the said corporation shall have power to borrow and advance money, acquire and dispose of real and personal property, to cultivate crops and to use or sell the same, and to do all other acts necessary or proper to the convenient conduct of the business aforesaid.

§ 84f. Mining Company.

To enter, acquire, own, or lease mines, mineral lands, and mining claims of any and every kind, and any interest in or concerning same, and to prosecute, work, and develop the same, either for itself, or for other persons or corporations, upon such terms and for such remuneration as it shall deem fit or proper; and in connection with the working of such mines, and the products of ores and minerals therefrom, to reduce all such ores and minerals to profitable merchantable value, and to sell, exchange, or otherwise dispose of the same; and in connection therewith to contract for, build, buy, or otherwise acquire, own, operate, and dispose of, all necessary buildings, mill sites, water rights, mills, smelters, machinery, roads, railroads, tramways, terminal facilities, ditches, flumes, and such other property as may be necessary and proper to its corporate objects; and to acquire, own, control, or dispose of stock of other corporations; and to engage in trade of every kind as well as in transportation; and to do everything else that may be directly or indirectly conducive to any of the objects of the company; as well as to contribute to, subsidize, or otherwise aid or take part in any such operations.

§ 84g. Apartment House Company.

To acquire by purchase, gift, lease, exchange, or otherwise, real and personal property or either, or any interest or estate therein, and any rights over or connected therewith; and to lease, sell, or

otherwise part with or incumber the same; to turn the same to account as may seem expedient; and in particular to prepare building sites, and to construct, reconstruct, alter, improve, decorate, furnish, and maintain buildings for hotel purposes, dwelling and apartment houses, and other structures for the accommodation of the public and of individuals; to occupy, manage, conduct, and carry on hotels, apartment houses, dwelling houses, restaurants, and places for accommodation of the public and of individuals, whether such buildings or places belong to this corporation or not; and to collect rents and incomes, and to supply to tenants and others attendance, messengers, light, heat and power, and all other conveniences and advantages; and, in connection with the objects hereinabove enumerated, to establish and conduct, and permit the establishment and operation of, any business which may be conveniently carried on, and the establishment of which may be directly or indirectly conducive to any of the objects of the corporation; as well as to contribute to, subsidize, or otherwise aid or take part in any such operations.

Clauses Regulating Business.

§ 85. Executive Committee.

There may be an executive committee, composed of such members of the board of directors as may be prescribed by the by-laws, the members of said committee to be designated by said board by resolution passed by a majority thereof, which committee shall have and may exercise all the powers conferred upon the board of directors by law or by the charter or by-laws of this corporation, either between the meetings of the board of directors, or at any meetings of such board when a quorum thereof shall not be present. The executive committee shall have power to elect its own officers, to prescribe regulations for the conduct of its business, and to fix the number necessary to constitute a quorum. The compensation of the members of the executive committee shall be fixed by the stockholders, and their terms of office shall be co-extensive with their terms of office as directors.

§ 85a. Action Taken Outside of Meeting.

Whenever any resolution in writing may be signed, or any proposed action acquiesced in in writing by all the members of the board of directors or the executive committee, such resolution or proposed action shall be taken and considered to be the act of the board of directors, or the executive committee, as the case may be, with the

same force and effect as if the same had been duly approved by the same vote at a meeting of the board or of the executive committee, respectively, duly called and convened; and it shall be the duty of the secretary of the company to cause such action to be recorded in the minute book of the company with the same particularity as if it had been so approved.

§ 85b. Power of Directors to Sell Business as an Entirety.

The board of directors shall have power to sell, assign, transfer, convey, or otherwise dispose of the whole or any part of the property or assets of the corporation as an entirety or going concern, either for cash, or in exchange for other property or securities, on such terms and conditions as they may deem proper and fair to the interests of the stockholders.

§ 85c. Cumulative Voting.

In all elections for directors, each stockholder shall have the right to vote the number of shares of stock owned by him for as many persons as there are directors to be elected, or to cumulate said votes and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit.

CHAPTER IV.

ESSENTIALS OF INITIAL MEETINGS OF INCORPORATORS.

§ 86. Commencement of Corporate Life.

It is frequently provided by statute that the existence of a corporation shall commence with the filing of the certificate. In the absence of statute the general rule is that the corporation is "deemed to exist from the time when the certificate of incorporation prescribed by the governing statute is executed, acknowledged, and recorded, or filed for record, in accordance with the governing statute." [1] This rule, however, must be understood with some qualifications. If the corporation perfects its organization properly, no doubt its existence will be held to date back to the time of the filing of the certificate. But if it should happen that the initial meeting for the purpose of organization should be held outside the state conferring the charter, then, in accordance with a long line of author-

[1] 10 Cyc. 223.

ities, it might well be held in a proper proceeding that the corporation never was validly organized, and that the alleged stockholders therein are liable as partners.[2] It becomes therefore important to know where the initial meeting must be held, and what the consequences of holding such meeting in a different place would be.

§ 87. Place of Holding Initial Meeting.

It is a fundamental principle of corporation law that the meetings of stockholders must be held within the limits of the state creating the corporation.[3] In this connection the same distinction has been drawn between meetings for the purpose of performing "constituent" acts and those which do not, as has been drawn in the case of directors' meetings.[4] But it is obvious that the *first* meeting of incorporators must be one for the purpose of doing constituent acts. It is at this meeting that directors are elected, by-laws adopted, and other things done which permit the corporation to start out upon its career. Accordingly it has been held in a number of cases that so-called corporations whose initial meetings have been held beyond the borders of the parent state are dead things ab initio, having never had breathed into them the breath of life. The structures have been created, but no spark of vitality has ever been infused into them.[5]

[2] Hill v. Beach, 12 N. J. Eq. 31; Duke v. Taylor, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232; Bigelow v. Gregory, 73 Ill. 197; Williams v. Hewitt, 47 La. Ann. 1076, 17 South. 496, 49 Am. St. Rep. 394; Owen v. Shepard, 59 Fed. 746, 8 C. C. A. 244.

[3] 2 Cook, Corp. § 589.

[4] Supra, c. III; 10 Cyc. 320.

[5] Smith v. Mining Co., 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760; Miller v. Ewer, 27 Me. 509, 46 Am. Dec. 619; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274; Franco-Texan Land Co. v. Laigle, 59 Tex. 339; Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342; Hill v. Beach, 12 N. J. Eq. 31; Duke v. Taylor, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232; Hodgson v. Railroad Co., 46 Minn. 454, 49 N. W. 197; Freeman v. Mill Co., 38 Me. 343; Jones v. Mining Co., 20 Colo. 417, 38 Pac. 700.

§ 87a. The question of the validity or invalidity of the corporate organization under such circumstances will nevertheless seldom be inquired into by the courts, and the corporation will be generally treated as existing de facto if not de jure. The party seeking to raise the question will generally be estopped from so doing. For instance, a corporation itself will be estopped from attacking its own existence.[6] So, also, are the stockholders who participate in the meeting.[7] Persons dealing with a de facto corporation as such are estopped to deny its corporate existence.[8]

§ 87b. There are, however, cases where such irregularities might be shown. The state may always, in a direct proceeding for that purpose, obtain a judgment of ouster.[9] The question has been raised in a proceeding by stockholders to enjoin a corporation from forfeiting stock for the nonpayment of assessments thereupon.[10] In the case cited in the note it appeared that a special charter had been granted by the Legislature of North Carolina, which was accepted at a meeting of the incorporators held in the city of Baltimore, Md., where they elected a president, secretary, and treasurer, adopted a seal, and performed all the necessary acts leading up to the organization of the company for the purpose of doing business. Apparently neither party raised the question of the illegality in the original meeting of incorporators, the complainant claiming merely that the meeting of directors held in Maryland at which the forfeiture was declared was a nullity. But

[6] Heath v. Smelting Co., 39 Wis. 146; Southern Bank v. Williams, 25 Ga. 534; Dooley v. Glass Co., 15 Gray (Mass.) 494; 10 Cyc. 249, and cases cited.

[7] Camp v. Byrne, 41 Mo. 525; Ohio & M. R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128; Ormsby v. Copper Co., 56 N. Y. 623; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; 10 Cyc. 249.

[8] Ohio Nat. Bank of Washington v. Construction Co., 17 App. D. C. 524; Oregonian R. Co. v. Navigation Co. (C. C.) 22 Fed. 248; 10 Cyc. 245-248, and cases cited.

[9] 10 Cyc. 1291; 1 Clark & M. Corp. §§ 70, 71, 81, 93.

[10] Smith v. Mining Co., 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760.

the court, of its own motion, went back to the original irregularity in not holding the initial meeting in North Carolina, and held that the corporation had no legal existence, and dismissed the bill of complaint upon that ground.

§ 87c. In the case of Miller v. Ewer,* which was an action of ejectment, the plaintiffs claimed title through a deed from a company which had received a charter from the state of Maine, but which held its meeting for organization in the city of New York, where the charter was accepted. It was held that, inasmuch as all subsequent proceedings were based upon this extraterritorial meeting, no deed could have been either authorized or delivered by this company, which, because of such extraterritorial initial meeting, never had a legal existence.

§ 87d. In Duke v. Taylor † the "Florida Orange Hedge Fence Company" executed its negotiable promissory note signed by said name, "by its Pres., Jno. W. Childress, James A. Knox, as Secretary and Treasurer." This note came into the hands of the plaintiff for value before maturity. At maturity, the note remaining unpaid, the holder filed his suit against sixteen persons, comprising said alleged company, seeking to hold them liable upon the note as partners. The evidence showed that the state of Tennessee had granted a charter to these defendants under its general laws, but that the meeting for organization had been convened in the state of Florida. The court held that no valid organization had taken place. It also held that the holder of the note was not estopped to deny the corporate existence, for the reason that the note contained "no recital that the company in whose name it was executed was a corporation," and there was nothing to overcome the evidence of the plaintiff that he did not know that the company was a corporation when he received the note, and that it did not appear that he "contracted with or dealt with the company as a corporation."

* 27 Me. 509, 46 Am. Dec. 619.

† 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232.

§ 87e. As we have heretofore had occasion to point out, in many states the statutes expressly permit the stockholders' meetings to be held outside of the state granting the charter, and in some of them it is enacted that even the initial meeting may be so held. Few cases have arisen in which the validity of such statutes has been called into question. Upon general principles it would seem that the courts of no state are bound to recognize as a corporation individuals who, residing elsewhere, merely file articles of incorporation in a given political territory without themselves at any time coming within its jurisdiction. If citizens of New York may take advantage of the New Jersey laws for the purpose of incorporation, the laws of the latter state being more favorable for certain purposes than those of their own, then upon the same principles it would seem equally competent for these persons to seek to protect themselves from liability for their acts by pretending to avail themselves of the laws of China or Corea. Under the broad principles which now prevail recognizing the right of corporations legally created in one jurisdiction to transact business in another, it is quite possible that even the laws of China or Corea might confer corporate privileges, provided such nation once acquired jurisdiction for this purpose.[11] Having acquired jurisdiction, it might then send out its corporations into other countries, with powers which would be elsewhere recognized under principles of international comity, even with the power to hold corporate meetings to perform constituent acts elsewhere. But, in order that that jurisdiction should once attach, it would seem that the *initial* meeting of the incorporators should be held within the state which confers the corporate privileges. After that there is little practical

[11] Liverpool & L. Life & Fire Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 19 L. Ed. 1029; Gen. Corp. Act N. J. § 95, as amended by P. L. 1903, c. 22; King v. Sarria, 69 N. Y. 24, 25 Am. Rep. 128; Oregonian R. Co. v. Navigation Co. (C. C.) 23 Fed. 232; reversed on another point, Oregon R. & Nav. Co. v. Railroad Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 807; Merrick v. Van Santvoord, 34 N. Y. 208.

danger that the question of the right to hold stockholders' meetings elsewhere could be attacked with much success. Certainly the state which by its legislation permits this very thing to be done could not question it. No more could the corporation itself, or a stockholder or a creditor contracting with the company as a corporation. Certain expressions used in the opinions in the cases cited in the note seem to countenance this doctrine.[12]

§ 87f. It is quite probable, though by no means settled, that a court in another state would give effect to the statutory power conferred upon a corporation of holding its stockholders' meetings beyond the limits of the state conferring the charter, and would not raise the question, as they did in Smith v. Silver Valley Min. Co.,‡ or permit it to be raised by a third party, as in Camp v. Byrne.**

§ 87g. When the incorporators or a majority of them are nonresident, it is a common practice, and one which has never been successfully assailed, for these persons to send their proxies to parties within the state, or to deliver them to persons who journey to the state for the purpose of holding the initial meeting. It has been held that there must be at least two persons present, for otherwise the term "meeting" would be a misnomer.[13] A simple form of proxy for this purpose would be as follows:

§ 88. Proxy for Initial Meeting.

The undersigned, one of the incorporators of the ..... Company (a subscriber to ..... shares of stock therein),

[12] Duke v. Taylor, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232; Jones v. Mining Co., 20 Colo. 417, 38 Pac. 700; Graham v. Railroad Co., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196; Craig Silver Co. v. Smith, 163 Mass. 262, 39 N. E. 1116.

‡ 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760.

** 41 Mo. 525.

[13] Sharpe v. Dawes, 2 Q. B. D. 26; In re Sanitary Carbon Co. (1877) 12 Wkly. Notes, 223; 2 Cook, Corp. bot. p. 1298. Contra: Morrill v. Manufacturing Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174.

hereby constitutes and appoints ..... as proxy, with full power of substitution and revocation, to vote for and in the name of the undersigned at the initial meeting of the incorporators of said company to be held at ..... on the ..... day of ....., A. D. 19.., and at any adjournment thereof, giving and granting unto said proxy full power to act for and on behalf of the undersigned in the transaction of any business which may legally come before said meeting, to the same extent as the undersigned could do if personally present.

In testimony whereof the undersigned has hereunto signed his name and affixed his seal this ..... day of ....., A. D. 19...

..... [Seal.]

Witness: .....

§ 89. Time of Holding Meeting.

Many of the states provide a maximum or minimum time or both after the filing of the certificate when the initial meeting of the incorporators must be held. Such statutes should be carefully followed. In the absence of such legislation, all that is required is that the meeting be held within a reasonable time after the certificate is filed.

§ 89a. Even where the time for the meeting is limited by law, it is quite competent for such requirement to be waived, provided all the incorporators unite in the waiver.[14] This waiver, in order to be effectual, must be absolutely unanimous, although all of the incorporators need not sign a paper to that effect, their presence and participation without objection in the meeting constituting a sufficient waiver.[15]

§ 90. Waiver of Notice of Initial Meeting of Incorporators.

The undersigned, incorporators and subscribers to the capital stock of the ..... Company, a corporation created under the laws

[14] Braintree Water-Supply Co. v. Braintree, 146 Mass. 482, 16 N. E. 420; 2 Cook, Corp. § 599.

[15] Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227;

of the state of ....., do hereby waive legal notice of the time, place, and purpose of the initial meeting of such incorporators and subscribers, and do hereby call said meeting to be held at ....., in the state of ....., on the ..... day of ....., A. D. 19.., at the hour of ..... o'clock in the .....noon, and we consent that at such meeting any and all business which may pertain to the affairs of the company may be transacted.

In testimony whereof we have signed these presents on this ..... day of ....., A. D. 19...

.....

Witness: ....

§ 91. Notice of Meeting for Assessment.

It is generally required that before an assessment can be levied upon the stock subscribed for there must be notice given for a certain length of time, either by publication or in some other manner. This requirement may also be waived by a document signed by all parties interested, in the following or equivalent form: [16]

§ 91a. Waiver of Notice of Assessment.

The undersigned, subscribers to the capital stock of the ..... Company, a corporation created under the laws of the state of ....., do hereby waive all legal notice, by publication or otherwise, of the time, place, and manner of making payment of our several subscriptions, and of the meeting to determine the same, and we hereby severally agree to pay any part or all of the same at such time or times, and in such amounts, as the board of directors may in its discretion designate.

In testimony whereof we have signed these presents this ..... day of ....., A. D. 19...

.....

Witness: ....

3 Clark & M. Corp. § 647; 1 Cyc. 329, and cases cited; 2 Cook, Corp. § 599.

[16] See § 89a, and note.

§ 92. Notice of Meeting to Increase Capital Stock.

Inasmuch as at the first meeting of incorporators it may be deemed desirable to authorize the directors to issue stock beyond the amount fixed as that with which the company shall start in business, and as the statutes of many states require certain formalities by way of notice, advertisement, etc., before this can be done, a waiver of these formalities may also be obtained in a form similar to that which follows:[17]

§ 92a. Waiver of Notice of Meeting to Increase Capital Stock.

The undersigned, incorporators and subscribers to the capital stock of the ..... Company, a corporation created under the laws of the state of ....., do hereby waive all legal and statutory requirements as to notice of the time and place of the meeting for the purpose of considering a proposition to increase the company's capital stock, and the number of shares thereof, and do consent that such matters may be considered at a meeting of the incorporators and subscribers to the capital stock to be held at ....., in the city of ....., on the ..... day of ....., A. D. 19.., at the hour of ..... o'clock in the .....noon; and do also consent and agree that at said meeting or any other meeting the board of directors may be authorized and directed to take appropriate action in that regard, and from time to time issue such additional shares as they may deem proper, up to the maximum amount of the capital stock limited by the charter.

In testimony whereof we have signed these presents this ..... day of ....., A. D. 19..

.....

Witness: ....

§ 93. Papers Prepared in Advance.

The general practice is for the attorney of the corporation to prepare, prior to the first meeting of the incorporators, proxies similar to the form given above, to be signed by those who cannot be present, accompanied by such waivers as may be needed.

[17] 10 Cyc. 541. See supra, § 89a, and note.

§ 94. Transfer of Subscription.

Should any subscriber, before stock is issued to him, desire to transfer his rights in such stock to another person, as is frequently done prior to the initial meeting, he may do this by a document substantially like the one following:[18]

§ 94a. Form of Transfer of Subscription.

Know all men by these presents, that the undersigned, for value received, has sold, assigned, transferred, and set over, and by these presents does sell, assign, transfer, and set over, unto ....., all the right, title, and interest of the undersigned, as an incorporator of, or subscriber to the stock of, the ..... Company, a corporation created under the laws of the state of ....., to the extent of ..... shares thereof, and hereby requests the said company to issue a certificate for the number of shares last aforementioned to the said ..... or his assigns, instead of to the undersigned.

In testimony whereof the undersigned has hereunto set his name and affixed his seal this ..... day of ....., A. D. 19...

Witness: .... [Seal.]

The said transfer is hereby assented to by this company.

..... Company,
By ....., President.

§ 95. Notice of Meeting.

If for any reason it is not practicable to procure the waiver above mentioned from all of the incorporators, and those from whom waivers cannot be procured will be absent from the meeting, it is of the highest importance that the proper notice of the initial meeting should be given to each and every incorporator and subscriber to the stock. Otherwise the action taken thereat would be invalid.[19]

§ 95a. Requisites of Notice.

If a statutory mode of giving notice is fixed, that mode must be followed; if not, the requisites of the notice may be said

[18] Manchester St. Ry. Co. v. Williams, 71 N. H. 312, 52 Atl. 461.
[19] 10 Cyc. 323, 324; 3 Cook, Corp. § 594.

to be five in number. First, it must be issued by one who has authority to issue it; second, it must be issued a reasonable length of time before the meeting is to be held; third, it must state the time of the meeting, unless this is fixed in the charter; fourth, it must state the place where the meeting is to be held, unless this is fixed in the charter; fifth, it must state the business to be transacted thereat.[20] The following form of notice will suffice:

§ 95b. Form of Notice.

New York City, ..., 19...

Mr. John Doe, 422 Fourth St., N. W., Washington, D. C.

Dear Sir: You are hereby notified that the initial meeting of the incorporators and subscribers to the capital stock of the ..... Company, a corporation created under the laws of the state of New York, will be held at ....., in the city of New York, on the ..... day of ....., A. D. 19.., for the purpose of transacting any and all business which may legally come before such initial meeting.

....., Secretary.

§ 95c. Notice by Publication.

If notice is required to be published, and no particular form is set forth in the statute, the following form would answer:

Notice is hereby given that the initial meeting of the incorporators and subscribers to the capital stock of the ..... Company, a corporation created under the laws of the state of New York, will be held at ....., in the state of New York, on the ..... day of ....., A. D. 19.., for the purpose of transacting any and all business which may legally come before such initial meeting.

....., Secretary.

§ 95d. Manner of Publication.

This notice should be published in such number of newspapers for such length of time and at such intervals as the statute prescribes.

[20] 3 Clark & M. Corp. §§ 647, 648; 10 Cyc. 324, 325; 2 Cook, Corp. § 595.

§ 96. **Quorum.**

At common law the rule seems to be that, except where the rule of voting is by shares, those incorporators and subscribers who attend a duly called meeting may transact the business of that meeting, although a majority in interest or in number is not present.[21]

§ 96a. If the statute or charter, however, lays down a different rule, in order that business done at such meeting may be legal, a quorum must be present. Of those who attend, the majority rule.[22]

§ 96b. Most modern business corporations are governed by statutes or charters, entitling each share of stock to one vote. In such case the rule above announced [23] would not govern. It applies only to bodies composed of an indefinite number of persons, which would be the status of a corporation issuing shares of stock which may be assigned at will, giving each certificate holder a right to vote irrespective of the number of shares he holds. But where each share is entitled to one vote, as is now generally the case, the number of possible votes is definitely fixed, and a majority in interest must be present in order to constitute a quorum. Although some authority is found to the contrary,[24] it is believed that it would not be safe to proceed with the initial meeting of incorporators unless such majority should be present either in person or by proxy.[25] And there must be at least two persons actually present.[26]

[21] 2 Cook, Corp. § 607; 3 Clark & M. Corp. p. 1981; 10 Cyc. 329; In re Rapid Transit Ferry Co., 15 App. Div. 530, 44 N. Y. Supp. 539.

[22] Id.

[23] Supra, § 96.

[24] In re Rapid Transit Ferry Co., 15 App. Div. 530, 44 N. Y. Supp. 539; Morrill v. Manufacturing Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 147.

[25] 10 Cyc. 346; Haskell v. Read (Neb.) 93 N. W. 997.

[26] Supra, § 87g, and note.

CHAPTER V.

PROCEEDINGS AT FIRST MEETING OF INCORPORATORS.

§ 97. What should Appear in Minutes.

It will be the object of this chapter to outline clearly those essential proceedings which should be taken by the incorporators at their meeting held for the purposes of organization. All of the steps indicated should be clearly set forth in the minutes of the meeting.

§ 98. Chairman.

Some person interested in the corporation assumes the chair, and calls for nominations for the office of chairman of the meeting. A chairman having been elected, a secretary is next elected.

§ 99. Roll Call.

The roll will then be called to ascertain how many of the incorporators and subscribers to the stock are present, and a memorandum made by the secretary showing who are present in person and who by proxy. At the time the roll is called the person holding a proxy for the one whose name is mentioned will answer to it and file with the secretary the proxy; or, if preferred, such proxy may have been filed with the secretary in advance of the meeting. If the number of persons in attendance is small, instead of calling the roll the secretary might call upon each person present to present and file with him whatever proxies he holds, thus saving time in this way.

§ 100. Reading of Notice, Etc.

If the meeting has been convened upon formal call, the call is then read; if pursuant to waivers such as have been presented in the preceding chapter, the waivers are then read and ordered spread on the minutes. It is not *necessary* that these waivers should be spread upon the minutes, but by so doing a permanent record is kept of them, which may be found convenient for future use.

§ 101. Acceptance of Charter.

If the corporation has received a special charter from the legislature, such charter should then be read, and formally accepted by the incorporators.[1] If the corporation has been formed pursuant to a general law, it is usual, but not necessary, at this stage of the proceedings, to make mention of the fact that the certificate of incorporation has been filed, stating the time and place of such filing, and the liber and folio of the record where the same can be found. If the charter contains the names of the directors for the first year, as is sometimes required by statute, it is also well to have a formal recognition of the appointment of such directors spread upon the minutes.

§ 102. Transfer of Subscriptions.

If any of the subscriptions have been transferred, such transfer should be brought to the attention of the meeting by the secretary, and action taken recognizing such transfers.

§ 103. Adoption of By-Laws.

The next business in order is usually the adoption of by-laws. As a general rule the stockholders are the ones who make and change the by-laws.[2] Sometimes that power is vested by the statute in either the directors or the stockholders, and sometimes in the directors alone.[3] It is also quite a common practice in modern times to insert a provision in the by-laws enabling the directors to amend at will.[4] In determining whether by-laws should be adopted by the incorporators or by the directors, reference must be had to the statute of the state of incorporation.

§ 104. Assuming that the stockholders or incorporators are the ones upon whom this power devolves, the matter of by-laws should receive very careful consideration at this meet-

[1] 10 Cyc. 203; 1 Clark & M. Corp. § 44; 1 Cook, Corp. § 2a.
[2] Supra, § 75, and notes. [3] Id. [4] Id.

ing. It is customary to read and act upon the proposed draft, section by section, so that full deliberation may be had in determining whether or not to adopt them. The matter of by-laws will be discussed at greater length in the following chapter.[5]

§ 105. Election of Directors.

The election of directors is then usually proceeded with. If the directors for the first year are named in the charter in accordance with a statute, then of course such election would be superfluous. Otherwise they should be chosen at this meeting. If the legislature has prescribed no particular form in which the election should be conducted, it may be managed in the customary way. That is to say, some one nominates a board, and upon the nomination being seconded the vote is taken, the majority vote deciding. In practice there is generally no contest at this first meeting, inasmuch as the directors have usually been determined upon beforehand. Where the statute requires the election to be by ballot it is customary to instruct the secretary of the meeting to cast the ballot for the persons nominated, a procedure which may be had by unanimous consent.[6]

§ 105a. Inspectors of Election.

Where the election is contested, and inspectors are appointed to receive and count the ballots, the manner of proceeding is somewhat more complicated, and some rather interesting questions of law may arise. In the absence of some custom or law to the contrary, the inspectors are elected by those present at the meeting.[7] There is no law requiring an inspector to be a stockholder. Indeed, it has been said that it is better to select an outside person for this office.[8] For manifest reasons

[5] Infra, c. VI.

[6] Christ Church v. Pope, 8 Gray (Mass.) 140; 2 Cook, Corp. § 605.

[7] 2 Cook, § 605; State v. Merchant, 37 Ohio St. 251.

[8] Dickson v. McMurray, 28 Grant, Ch. (Can.) 533; People v. Rail-

it is better that the inspectors should not themselves be candidates, although it has been held in New York that this will not disqualify them.[9] Some statutes, recognizing the evil of inspectors being candidates, forbid this, although sometimes exceptions are made in favor of the first meeting.[10]

§ 106. Swearing Inspectors.

It is frequently required by statute that the inspectors shall be sworn before entering upon the duties of their office. The following form of oath complies with the usual requirements:

§ 107. Inspectors' Oath.

State of.....}
County of.....} ss.:

The undersigned, duly appointed to act as inspectors of election at the initial meeting of the incorporators and subscribers to the capital stock of the ..... Company, a corporation created under the laws of the state of ....., held at ....., in the city of ....., on the ..... day of ....., A. D. 19.., being severally duly sworn upon their respective oaths, do undertake, promise, swear, and say, and each for himself does undertake, promise, swear, and say, that they and he will faithfully, honestly, and impartially perform the duties of inspectors and inspector of election for directors of said company to be held on said date, to the best of their and his ability, and make a true report of the results of said election. .....

.....

Severally subscribed and sworn to before me this ..... day of ....., A. D. 19..

[Notarial Seal.] ....., Notary Public.

§ 108. Counting Ballots.

After qualifying, the inspectors take charge of the election, receiving the ballots and counting them. Their powers are

road Co., 55 Barb. (N. Y.) 344. See, also, Stebbins v. Merritt, 10 Cush. (Mass.) 27.

[9] Ex parte Willcocks, 7 Cow. 402, 17 Am. Dec. 525.

[10] Civ. Code Porto Rico, tit. 2, c. 1, § 48; Gen. Corp. Law N. J. § 35.

merely ministerial. If a vote is challenged the only evidence they may receive upon the question of the right of the party offering the vote to cast it are the books of the company, the stock transfer books controlling.[11]

§ 108a. Powers of Inspectors.

Inspectors of election have no power to pass upon the validity of proxies apparently regular upon their face.[12] They have no right to require a proxy to be acknowledged or proven by a subscribing witness, unless the statute or by-laws require it,[13] nor can the inspectors pass upon the qualifications of a candidate for election; and votes cast for an ineligible candidate will not be discarded so as to result in the election of one having a minority of the votes, unless it is made to appear that those voting knew of the ineligibility of the candidate for whom they voted.[14] But the stockholders should be careful not to nominate candidates who would be ineligible; and in considering this they should ascertain whether candidates proposed have the requisite capacity with regard to residence, stock ownership, etc., to hold the office for which they are nominated; otherwise the courts may declare the election invalid.

§ 109. Inspectors' Report.

After the votes have been counted and the result ascertained the inspectors make their report to the meeting, which may be in the following form:

§ 110. Form of Inspectors' Certificate.

The undersigned, the inspectors duly appointed to conduct the election for directors of the ..... Company, a corporation

[11] In re Election of St. Lawrence Steamboat Co., 44 N. J. Law. 529; Downing v. Potts, 23 N. J. Law, 66; People v. Kip, 4 Cow. (N. Y.) 382, note.

[12] In re Cecil, 36 How. Prac. (N. Y.) 477; In re Election of St. Lawrence Steamboat Co., supra.

[13] Id.

[14] In re Election of St. Lawrence Steamboat Co., 44 N. J. Law, 529.

created under the laws of the state of ....., do hereby certify and report that at a meeting of the incorporators and subscribers to the capital stock of said company held at ....., in the city of ....., on the ..... day of ....., A. D. 19.., at the hour of ..... o'clock in the ....noon, a quorum being present, after the undersigned had been first duly sworn by the form of oath filed herewith to impartially conduct said election, we did hold and conduct the election aforesaid, and did receive the ballots of the persons entitled to vote thereat; that the total number of votes cast was .....; and that the result of the vote taken thereat was the election by the vote set opposite their respective names herein of the following directors to serve for the ensuing year:

Name.	Votes Received.
John Doe.....	.....
Richard Roe.....	.....
William Blackstone.....	.....
etc.	etc.

In testimony whereof we have hereunto set our names and affixed our seals this ..... day of ....., A. D. 19...

....., [Seal.]
....., [Seal.]
Inspectors.

§ 111. Notary's Certificate.

If it is desired to have the report authenticated, the following form of notary's certificate is sometimes used:

§ 111a. Form of Notary's Certificate.

State of.....}
County of.....} ss.:

On the ..... day of ....., A. D. 19.., before me personally came (fill in names of inspectors), to me known to be the persons who executed the foregoing certificate, and severally acknowledged that they executed the same for the purposes therein set forth.

.....,
[Notarial Seal.] Notary Public.

§ 112. Filing Certificate.

In the state of New York both the inspectors' oath and certificate must be afterwards filed in the office of the clerk of

the county in which the election is held.[15] Wherever this is not required, these documents should be retained by the secretary of the company for use whenever desired.

§ 113. Election of Officers.

The subordinate officers of the corporation are generally elected by the directors.[16] But occasionally provision is made for the election of these officers or some of them by the stockholders. It is not at all infrequent to have the stockholders elect the president of the corporation. In case such election is to be conducted at a stockholders' meeting, in regular order, it would now take place, being managed in much the same way as the election of directors was held.

§ 114. Authority to Directors to Assess Stock.

When the understanding is that stock is to be paid for in installments, it is usual at the first meeting of incorporators to give to the board of directors power to assess the stock up to the full amount, payable as and when called for by the board.

§ 115. Payment for Stock.

With reference to this feature, a distinction must be drawn among the various laws of the different states. Where payment for stock is required to be in cash, the statutory requirement must be followed. Of course, it would be competent for the corporation, at the same time that the cash is paid, to pay it back again to the subscriber for services or property. But it must appear upon the books as a cash transaction, and the whole proceeding must be bona fide.

[15] Gen. Corp. Law N. Y. § 26.

[16] Batchelor v. Bank, 78 Ky. 435; Granger v. Brewing Co., 25 Misc. Rep. 302, 54 N. Y. Supp. 590; Dill, N. J. Corp. p. 5.

§ 115a. Exchange of Stock for Property.

As we have heretofore seen,[17] sometimes payment may be made in property, and sometimes either in property or services. The legislatures in many states have enacted that the judgment of the board of directors as to the value of such property or services is, in the absence of fraud, final and conclusive. In other states there is no statutory provision on the subject. But without such it is now well settled that, in order to make void stock which is issued for property taken at an overvaluation, it must be shown, not only that there was an overvaluation, but also that such overvaluation was intentional and fraudulent.[18] But the state might bring an action to declare a forfeiture of the corporate franchise in a flagrant case.[19] Stockholders not assenting to it may also bring suit to annul and set aside the whole transaction.[20] But the great weight of authority is in favor of the proposition that corporate creditors cannot hold the owners of such stock liable as for stock not fully paid,[21] though if the property which is turned in is practically worthless, or is unsubstantial or shadowy in its nature, the courts hold that there has been no payment at all, and that the stockholders are liable upon the stock.[22] Of course,

[17] Chapter I.

[18] Coit v. Amalgamating Co., 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420; Bank of Fort Madison v. Alden, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725; Lloyd v. Preston, 146 U. S. 630, 13 Sup. Ct. 131, 36 L. Ed. 1111.

[19] State v. Redemption Co., 51 La. Ann. 1827, 26 South. 586; State ex inf. Attorney General v. Hogan, 163 Mo. 43, 63 S. W. 378.

[20] Insurance Press v. Wire Co., 70 App. Div. 50, 74 N. Y. Supp. 1093; Langan v. Francklyn, 29 Abb. N. C. 102, 20 N. Y. Supp. 404; Alabama Foundry & Machine Works v. Dallas, 127 Ala. 513, 20 South. 459; Dean v. Baldwin, 99 Ill. App. 582.

[21] Coit v. Amalgamating Co., 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420; Bank of Fort Madison v. Alden, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725; Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104.

[22] Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363. For an elaborate discussion of this whole matter, see 1 Cook, Corp. §§ 35–47.

the principles above announced are subject at any time to change by statutory provisions.

§ 116. Donating Stock Back to Treasury.

Frequently a corporation will be formed merely for the purpose of taking over an existing business owned by another corporation or by an individual or set of individuals, or such property may be received in payment for a part of the stock issued by the new corporation. As it is found that stock can be more readily sold at less than par than at par, a favorite device is to have property turned in at a fixed valuation, and stock issued in payment therefor, the vendor of the property then donating back to the treasury of the company, to be held by it as treasury stock, and issued under the direction of its board of directors, a certain amount of the stock which had been issued to him, and which may thereafter be sold by the corporation at less than par and still retain its character of full-paid stock. The legality of this has been upheld in the absence of a statute forbidding it.[23]

§ 116a. Accepting Proposition.

The practice, therefore, is at the first meeting of incorporators to present a formal proposition from the owner of such property, offering the same to the corporation at a figure named, to be paid for in full-paid and nonassessable stock, and stating that in the event of the acceptance of the proposition a certain proportion of the stock to be issued will be donated back to the company, to be disposed of as it sees fit. The incorporators then pass a resolution reciting that such property is necessary to the conduct of the business of the company, and that the same is of the value named, and authorizing the directors, in their discretion, to make the purchase under the terms of the proposition, and issue stock in payment to the vendor and his nominees. It is quite customary also to

[23] 1 Cook, Corp. bott. p. 133, and cases cited.

have the original proposition recite an agreement between the proposer and the incorporators by which the stock to be issued to him or to his order is to include the incorporators' stock. Care should be taken, however, not to issue all of the stock to one person or corporation, because there should always be a sufficient number of persons stockholders in the corporation to preserve its corporate existence under the laws.

§ 116b. Trustees to Hold Treasury Stock.

Should it be deemed necessary, in order to keep this treasury stock separate and apart from the unissued stock of the company, to place it in the names of trustees to hold subject to orders of the board of directors, the resolution above referred to should include the appointment of trustees to receive and hold the stock, and a statement of the terms upon which it is to be held by them.

§ 117. Authority to Issue Stock to Incorporators.

If the proposition above adverted to does not include the incorporators' stock, then authority is generally specifically conferred upon the board by the stockholders to issue the shares subscribed for by the incorporators when the same shall have been fully paid.

§ 118. Authority to Issue Stock to Charter Limit.

In order that the directors may proceed at once with the project in hand, authority may be given them at this first meeting to issue, at their discretion, such stock as may be necessary, beyond the amount named in the charter as that with which the company is to commence business, up to the full amount permitted.

§ 119. Authority to Establish Office, Etc.

The state legislatures have generally enacted laws requiring each corporation to open and maintain an office in the parent

state, where the company's sign shall be displayed, certain corporate books kept, and an agent stationed, authorized to accept service on behalf of the corporation in any suits which may be filed against it. Sometimes statutes require the resolution authorizing this to be passed by the stockholders, and sometimes by the board of directors. It is an important matter, and should not be overlooked. A certified copy of this resolution should usually be filed with the proper official of the parent state.

§ 120. Corporate Seal.

This should preferably be approved by the stockholders at this meeting.

§ 121. Form of Stock Certificate.

It is also well to have the stockholders agree upon the form of stock certificate, although this might be done by the board of directors.

§ 122. Issue of Preferred Stock.

The charter may not have provided for the issue of preferred stock, although it may be deemed expedient to create stock of this species. This is the occasion, therefore, when such issue should be authorized. Even though the statute is silent on the subject, it is perfectly legal for the stockholders at this first meeting to pass a resolution authorizing this class of stock.[24] It is important that it should be done at this first meeting, however, for if any common stock is issued preferred stock cannot afterwards be issued without the unanimous consent of all the stockholders, unless the statute permits it.[25] The resolution providing for this class of stock should state

[24] 1 Cook, Corp. § 268, and notes; 2 Clark & M. Corp. § 415.
[25] Id.

very clearly the nature of the preferences, as to which more will be said in another chapter.[26]

§ 123. Salaries to Officers.

Although the question of salaries is usually committed to the board of directors for determination, it is a settled principle that the directors have no power to vote to themselves salaries as such.[27] If, therefore, these officers are to receive compensation in that capacity, the stockholders should vote it to them.

§ 123a. Directors as Officers.

Corporations have frequently become involved in litigation because the directors, although not voting salaries to themselves as directors, have conferred upon themselves as officers a rate of compensation which was thought by some of the stockholders to be excessive and to smack of fraud. Because of this the managers of many corporations have found it a wise precaution to have a resolution passed at the stockholders' meeting fixing the salaries of the officers, where the directors are themselves to be such officers. It would be more difficult after such a resolution to claim with much prospect of success that the directors had acted fraudulently in this connection.[28]

§ 124. Miscellaneous Matters.

Such other miscellaneous matters of business as may properly come before the meeting may also be transacted.

§ 125. Adjournment.

The meeting should then formally adjourn, either sine die or to a day certain.

[26] Infra, c. VIII.

[27] Fitzgerald & Mallory Const. Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608.

[28] Davis v. Thomas & Davis Co., 63 N. J. Eq. 572, 52 Atl. 717.

§ 126. Minutes.

It has become quite general to write up the minutes of this first meeting in advance, for the reason that there are always certain formal matters to be passed upon which are as a rule entirely understood and agreed upon before the meeting is called. By so doing nothing is apt to be forgotten. The proper record of the proceedings of every corporation is of the utmost importance, for the business done is apt to slip from the memories of those in attendance, and the minutes are the only means by which a permanent record may be kept. They are competent evidence, in suits between stockholders, to show the acts of the corporation.[29] They should be clear and explicit. There is no necessity for them to recite any of the arguments in favor of or against a certain proposition. All that is required is that the action finally taken should appear, although, when it is believed that the exact position of any stockholder on a certain question may thereafter be disputed, it is sometimes found expedient to incorporate in the minutes an epitome of his remarks upon this question. Then, too, it is better, if a stockholder taking part in a discussion desires that a memorandum of his views should be spread upon the minutes, that his wishes in this respect be complied with. In certain cases this may be demanded as a matter of right.[30]

§ 126a. How Kept.

The minutes should be kept in a book firmly bound. As a matter of convenience it is well to copy the charter in full

[29] Abernethy v. Society, 3 Daly (N. Y.) 1; Booth v. Fire Engine Co., 118 Ala. 369, 24 South. 405; Harrison v. Morton, 83 Md. 456, 35 Atl. 99; White Chimney & S. C. Turnpike Road Co. v. McMahan (Ky.) 50 S. W. 836; Heintzelman v. Association, 38 Minn. 138, 36 N. W. 100; Dennis v. Manufacturing Co., 19 R. I. 666, 36 Atl. 129, 61 Am. St. Rep. 805; Smith v. Steamboat Co., 1 How. (Miss.) 479; Brackett v. Persons Unknown, 53 Me. 228, 87 Am. Dec. 548.

[30] Gen. Corp. Law N. J. § 30.

on the first page of the minute book, followed by the by-laws, sufficient space being then left in the book to subsequently insert any amendments to the by-laws which may afterwards be adopted. Then should follow the minutes of the first meeting of the incorporators and subscribers to the stock, to which should be appended copies of such papers as may be ordered spread upon the record.

§ 126b. Signature.

When completed the minutes should, of course, be signed by the secretary. Sometimes it is considered better to have the president sign also, as an additional guaranty of their accuracy.

§ 127. Form of Minutes of First Meeting of Incorporators and Subscribers.

(To be varied to suit the circumstances of each case.)

The first meeting of the incorporators and subscribers to the capital stock of the ..... Company was held at ....., in the city of ..... on the ..... day of ....., A. D. 19.., at the hour of ..... o'clock in the ....noon, pursuant to notice (or pursuant to the waivers appended hereto).

The meeting was called to order by Mr. ....., who asked for nominations for the office of chairman. Mr. ..... was duly nominated and unanimously elected to this office. He having assumed the chair, nominations for secretary were called for, pursuant to which Mr. ..... was nominated and unanimously elected to that position, and assumed the duties thereof.

The roll was then called, showing the following attendance:

In Person.

Name.....	Number of Shares.....
Name.....	do.
etc.	etc.

By Proxy.

Name.....	Name of Proxy.....	Number of Shares.....
Name.....	Name of Proxy.....	do.
etc.	etc.	etc.

The call (or waiver of notice) upon which the meeting was convened was then read and ordered spread upon the minutes, and is as follows:

(Insert call or waiver, as the case may be.)

A waiver of notice of assessment was also read, signed by the persons whose names appear in these minutes appended thereto, and ordered spread upon the minutes, and is in the words and figures following:

(Insert waiver.)

Mr. ..... reported that the certificate of incorporation of the company had been filed in the office of (insert office of the proper state official where the certificate was filed), and had been there duly recorded in liber number ....., at page number ..... et seq., and presented a copy of the same, which was ordered spread upon the minutes.

(Note.—If the charter has been granted by a special act of the legislature, instead of the above entry a resolution should appear formally accepting such charter.)

Upon motion of Mr. ....., the directors named in said certificate were recognized as the directors of the company for the first year of its existence.

(Note.—In those states where the certificate of incorporation does not contain the names of the directors the above paragraph will, of course, be eliminated. In that event the paragraphs hereinafter inserted relating to the election of directors would appear at the place where the same appear in this form of minutes.)

Upon motion of Mr. ....., the following transfers of subscription were presented and recognized on behalf of the company:

Name of Original Subscriber.	Name of Transferee.	No. of Shares.
John Doe.	Richard Roe.	10
etc.	etc.	etc.
etc.	etc.	etc.

The secretary announced that a set of proposed by-laws had been drafted by counsel and was ready for consideration by the meeting; whereupon the same were read, section by section, and, after full discussion, the following by-laws were unanimously adopted to govern the affairs of the company:

(Insert the by-laws adopted, or make a note in the minutes referring to the page of the minute book where the by-laws can be found. Complete forms of by-laws will be found in §§ 136–137 of this book.)

The election of directors being next in order, the following gentlemen were elected (or appointed) inspectors of election, to wit: Messrs. ..... and ..... The oath of office was then

administered to them, a copy of which is appended to these minutes.

(It is not always necessary that the inspectors of election should be appointed. Consult the statutes with regard to this.)

The following persons were nominated by Mr. ..... as directors to hold office for the first year of the company's existence, to wit: (Insert names of nominees.) No other nominations being made, the nominations were ordered closed. The polls were then opened, and remained open until all those desiring to vote had cast their ballots, after which the polls were declared closed, and the ballots were counted. The inspectors then presented their report, a copy of which is appended to these minutes. In accordance therewith the following gentlemen were declared duly elected directors of the company for the first year of its existence, to wit: (Insert the names of directors elected.)

(Note.—All reference to the election of directors will be omitted where they are designated for the first year in the charter. In this event the paragraph appearing above, showing the recognition by the stockholders of the directors named in the charter, will be proper.)

Mr. ..... nominated the following officers to serve for the first year of the company's existence, to wit: (Insert names of nominees and the respective offices to which they were nominated.) No other nominations being made, the secretary was unanimously instructed to cast the ballot of the meeting for the gentlemen named, and they were declared duly elected to fill the said offices for the first year of the company's existence.

(Note.—Where the directors elect the officers, of course this item will not appear in the minutes of this meeting.)

On motion of Mr. ..... the board of directors was authorized to assess the stock subscribed for up to the limit of the par value thereof, payable when and as called for by said board.

The secretary then read a proposition tendered by Mr. ....., offering to sell to the company certain property therein described in exchange for one hundred thousand dollars of the capital stock of this company, to be issued to himself or his assigns, full paid and nonassessable, to include the stock subscribed for by the incorporators, offering also to donate to the treasury of the company twenty-five thousand dollars of such stock at par if the proposition should be accepted and the stock issued to him in accordance therewith.

After due consideration, the following preamble and resolutions were adopted upon motion of Mr. .....:

Whereas, a proposition has been received from Mr. ..... offering to sell, transfer, and assign to this company the following

described property, to wit (insert description); said property to be paid for by full-paid and nonassessable stock of this company of the par value of one hundred thousand dollars, to be issued to Mr. ..... or his assigns; offering also, in case of the acceptance of said proposition, to donate to the treasury of the company twenty-five thousand dollars of the stock to be issued in payment as aforesaid at par; and

Whereas, in the judgment of the stockholders and persons entitled to stock in this company, said proposition is fair and reasonable, and the value of the property offered is equal to that of the stock proposed to be issued in payment therefor, and such property is necessary to enable the company to properly conduct its affairs:

Therefore be it resolved that the board of directors be and they are hereby authorized and requested, if in their judgment it is proper so to do, to accept said proposition and purchase the property above mentioned upon the terms thereof, and to issue stock in payment in accordance therewith;

And be it further resolved that, in accordance with an agreement entered into between the individual incorporators of this company and the proposed vendor of said property, the stock to be issued in payment as aforesaid shall include the stock subscribed for by said incorporators, and said incorporators be released from all further obligation under their said subscriptions.

And be it further resolved that ..... and ..... be and they are hereby appointed trustees to receive and hold the twenty-five thousand dollars of stock to be donated to this company under the terms of said proposition, in accordance with the instructions which shall from time to time be given them by the board of directors.

On motion of Mr. ....., the directors were authorized to issue stock to the subscribers therefor upon receiving payment in full.

(Note.—This last item will not appear if the resolution inserted above is passed providing for the inclusion of the incorporators' shares in the stock to be issued to the vendor of the property therein referred to.)

Upon motion of Mr. ....., it was unanimously resolved that the board of directors be and they are hereby authorized from time to time, in their discretion, to issue capital stock of this company up to the full amount allowed by its charter, in such amounts as shall be lawfully fixed by said board, and to accept in full or in partial payment for said stock either cash or such property as the board may from time to time determine to be necessary to properly carry on the business of this company.

Upon motion of Mr. ..... the following resolution was unanimously adopted:

Ordered: (1) That in compliance with the laws of the state of (insert name of parent state) the registered office of the company in said state be established and continuously maintained at (fill in street and number).

(2) That ..... be and is hereby appointed the agent of this company in charge of said office, upon whom process against this corporation may be served, with instructions and authority to keep in said office the stock transfer books, to register transfers therein, and to keep all other books and records of this company by law required to be kept therein, during the usual hours of business, open to examination by every stockholder and other person entitled to inspect the same.

(3) That the name of this corporation shall be at all times conspicuously displayed on a sign at the entrance to said office.

(4) That any stockholder of the company shall be entitled to a list of the names and addresses of the stockholders, with a statement of the number of shares held by each, upon prepayment to said agent of a reasonable fee to be fixed by him for making same.

The secretary was, on motion of Mr. ....., directed to send a copy of the foregoing resolutions, duly certified by him under the corporate seal, to said agent, and to file a copy thereof with such state officials as the law may designate.

(Note.—In offering the above resolutions the statutes of the parent state should be consulted so as to make sure that everything required by law is comprised in them.)

Upon motion of Mr. ..... the design of corporate seal appended hereto was adopted as the corporate seal of this company.

On motion of Mr. ..... the following resolution was unanimously adopted:

Resolved, that the capital stock of this company be divided into two classes, to be known respectively as common and preferred, the common stock to be issued to the par value of $....., and the preferred stock to the par value of $.....

(Note.—The proportion of preferred stock must never exceed the statutory limit.)

And be it further resolved, that the holders of preferred stock shall be entitled to receive out of the net earnings for each fiscal year, as and when declared by the board of directors, a noncumulative dividend at the rate of but never exceeding 6% per annum, payable quarterly, before any dividend shall be set apart or paid on the common stock for such year; and in case of liquidation or dissolution the holders of said stock shall be paid the par value of their

preferred shares before any sum shall be paid to the holders of the common stock; and after the payment of the par value of the common stock to the holders thereof, any surplus, should there be such, is to be distributed ratably among all the shareholders, without preference.

(Note.—The above resolution will be varied to suit the particular terms of the preferences declared.)

And be it further resolved, that the forms of certificates of both common and preferred stock as appended to this resolution, and hereby ordered spread upon the minutes, be approved and adopted by the company.

On motion of Mr. ....., the following resolution was unanimously adopted:

Resolved, that the directors of this company be and they are hereby authorized to fix the salaries of the officers of this company at the following sums, to wit: (Insert the salaries fixed,) and that these salaries may be paid to the respective incumbents of said offices whether they are members of the board of directors or not.

The secretary was instructed to insert in the minute book, for purposes of reference, a copy of each of the following:

(1) Copy of certificate of incorporation (copied at page .....).

(2) Copy of by-laws (copied at page .....).

(3) Waiver of notice of this meeting (copied at page .....).

(4) Waiver of notice of assessment (copied at page .....).

(5) Waiver of notice of increase of capital stock (copied at page .....).

(6) Form of proxy signed by the absent incorporators and subscribers to the stock (copied at page .....).

(7) Transfers of subscription (copied at page .....).

(8) Oath and certificate of inspectors of election (copied at page .....).

(9) Corporate seal (impressed upon page .....).

(10) Forms of stock certificates (copied on page .....).

There being no further business, the meeting, on motion, adjourned.

.....

Secretary.

CHAPTER VI.

BY-LAWS.

§ 128. Skill in Preparation.

Much of the success in the practical workings of the company depends upon the foresight and skill displayed in the preparation of by-laws. The charter, as before stated, is the primary instrument to which resort must be had to determine the powers of a corporation;[1] but generally this merely outlines the machinery provided for its operations. It is to the by-laws that resort is generally had for specific guidance in these details.

§ 129. By Whom Passed.

By-laws are intended to define and limit the power of directors and officers, and should therefore be passed by the stockholders, although, as we have seen,[2] they sometimes contain within themselves the power to directors to alter or amend at their pleasure; and the legislation in a few states confers the power to make by-laws primarily upon the directors.

[1] Supra, § 59.

[2] Supra, § 103.

§ 130. **Object of.**

In preparing this document counsel generally has in mind either the advancement of the interests of the majority or the protection of the minority. The object of counsel in this particular will have much to do with the shape of the instrument as it comes from his office.

§ 131. **Variations in.**

It is impossible to prepare a form of by-laws which will satisfactorily govern the affairs of every corporation. The environments differ so widely that a set which will prove most acceptable to one corporation may turn out to be a stumbling-block to another organized in the same state, to accomplish the same business, but governed by a different class of men.

§ 132. **Inserting Law, Etc.**

Convenience will sometimes dictate that certain provisions of the statute law or of the charter should be inserted in the by-laws; not that these are thereby given any greater force, but that they are brought more prominently to the attention of the stockholders, and are more easily accessible to them. Statutes often prescribe certain privileges which may be exercised if a statement to this effect is incorporated in the by-laws, or that certain restrictions shall not apply if a provision to the contrary is inserted in this document. Therefore this instrument should never be framed without an accurate knowledge of the statutes on the subject.

§ 133. **Classification of Subjects.**

In preparing the by-laws a definite plan should be mapped out in the mind of the draftsman. It will be found convenient to divide them into eight parts, relating, in the order named, to the following subjects:

(1) Stockholders;
(2) Directors;
(3) Executive committee (if there is one);

(4) Officers;
(5) Stock;
(6) Financial management;
(7) Miscellaneous provisions;
(8) Amendments.

§ 134. Amendment.

By-laws may be amended from time to time in accordance with the wishes of the corporation; but they cannot be amended so as to impair any rights which have become vested by virtue of a previous by-law, even though the statute or charter may permit such amendments.[3]

§ 135. Forms of By-Laws.

Appended hereto are two sets of by-laws at present in use, one by a New York corporation well known in the manufacturing and commercial world; and one by the United States Steel Corporation, a copy of whose charter has already been set forth in these pages.[4] It is believed that these by-laws can be easily modified to suit the needs of any corporation, and they are inserted verbatim, in preference to preparing forms which might not be so well fitted for actual business needs.

§ 136. By-Laws.

Article I.

Stockholders' Meetings.

Section 1. All meetings of the stockholders of this company shall be held at the principal office or place of business of the company in the state of New York.

Sec. 2. The annual meeting of the stockholders of this company shall be held on the third Wednesday of October in each year, at which there shall be chosen nine persons, who shall be stockholders in said company, to be the directors of said company for the ensuing year. A notice of such meeting, either written or printed, or partly

[3] Kent v. Mining Co., 78 N. Y. 159; Bergman v. Association, 29 Minn. 275, 13 N. W. 120.

[4] Supra, § 84b.

written and partly printed, shall be mailed ten days before such meeting to each stockholder, to his post-office address appearing upon the records of the company, in addition to notice required by law to be published.

Sec. 3. If, for any reason, the annual meeting of stockholders shall not be held as hereinbefore provided, such annual meeting shall be called by the president and directors as soon as conveniently may be. It shall be the duty of the secretary, on the written request of five stockholders, if the election for directors has not been held as hereinbefore provided, to call a meeting of the stockholders as provided in section 2 for the election of directors.

Sec. 4. Special meetings of the stockholders of this company may be called at any time by the president. It shall also be the duty of the president to call a special meeting of the stockholders, whenever requested in writing so to do, by stockholders owning ten per cent. of the entire capital stock. If the president on such request neglects for 24 hours to call a special meeting, then the stockholders making the request may call a special meeting. Notice of special meetings shall be given by mailing a notice thereof to each stockholder, to his post-office address appearing upon the records of the company, at least ten days before such meeting. Such notice, in addition to stating the time at which said meeting shall be held, shall briefly state the object of said meeting, and no business not so stated shall be considered at such meeting, except on the unanimous consent of all stockholders present, in person or by proxy, at such special meeting.

Sec. 5. No meetings of stockholders shall be called or held except as authorized by the law of the state of New York or these by-laws.

Sec. 6. At all stockholders' meetings, stockholders owning at least thirty per cent. of the capital stock of the company, and present in person or by proxy, shall be necessary to constitute a quorum.

VOTING.

Sec. 7. At all annual meetings of stockholders, the right of any stockholder to vote shall be governed and determined by the transfer records. Only such persons shall be entitled to vote who appear as stockholders upon the transfer records of the company.

Sec. 8. No share of stock shall be voted upon at any election which has been transferred on the records of the company within ten days next preceding such election.

Sec. 9. Stockholders may give proxies to vote at any meeting.

Sec. 10. At all meetings of stockholders all questions except the question of an amendment of these by-laws, and the question of the election of directors, and all such other questions the decision of which is specially regulated by statute, shall be determined by a

majority vote of the stockholders present in person or by proxy; and, in the event of a tie vote, the presiding officer of the meeting shall cast the deciding vote, provided that any stockholder present may demand a stock vote. When a stock vote is demanded it shall immediately be taken, and each stockholder present shall be entitled to one vote for each share of stock he owns, as appears by the transfer records as hereinbefore provided, and one vote for each share of stock so owned by any stockholder whose proxy he may be, and the question shall be decided affirmatively by a vote of not less than twenty-five per cent. of all outstanding shares of stock of said company.

All voting shall be viva voce, except that a stock vote and vote for the election of directors shall be by ballot, and each ballot shall state the number of shares owned by the person voting, the name of the person voting, and the word "Yes," if the vote be an affirmative vote, and the word "No," if the vote be a negative vote, or the name of the person voted for if it be a vote for the election of a director.

Sec. 11. All meetings, either of stockholders or directors, shall be presided over by the president; and at all meetings of the directors the president may vote, and he may also vote at any stockholders' meeting in addition to the case provided for by the last section, whenever a stock vote is taken. In the absence of the president, the vice-president shall preside, and shall have all the powers herein conferred upon the president when acting as presiding officer of a meeting.

INSPECTORS OF ELECTION.

Sec. 12. At all meetings for election of directors, two inspectors of election shall be first elected by a majority stock vote of all the stockholders present at the meeting, in person or by proxy, provided that no person who is a candidate for the office of director shall be elected an inspector.

ORDER OF BUSINESS.

Sec. 13. At all meetings of stockholders the following order of business shall be observed, so far as consistent with the purpose of the meeting, viz.:

Reading minutes of preceding meeting and action thereon.
Report of president.
Report of treasurer.
Report of secretary.
Reports of committees.
Election of directors.
Unfinished business.
New business.

ARTICLE II.

DIRECTORS.

Section 1. The affairs of this company shall be managed by nine directors, who shall be annually chosen at the annual meeting of the stockholders, except as by these by-laws otherwise provided.

Sec. 2. All elections for directors shall be by ballot, and the poll at every such election shall be opened between the hours of nine a. m. and five p. m. and shall continue open at least one hour by daylight, and shall close before nine o'clock in the evening.

Sec. 3. In case a vacancy or vacancies, by death, resignation or otherwise, occurs in the board of directors between the time of the annual meetings, the remaining director or directors shall fill the vacancy or vacancies, by choosing from the stockholders as many persons as may be necessary to fill the vacancy or vacancies, and the person or persons so chosen shall be directors and hold office until their successors are elected.

Sec. 4. In case the entire board of directors should die or resign, then any stockholder may call a special meeting in the same manner that the president may call a special meeting, and new directors may be elected at such special meeting in the manner provided for the election of directors at annual meetings.

Sec. 5. Any director may resign his office at any time, such resignation to be made in writing, and it shall take effect from the time of its delivery to the president or to a majority of the board of directors.

Sec. 6. Any director who may be guilty of any fraud, or crime, or conduct prejudicial to the interests of this company, may be removed from his office by an affirmative majority vote of the other directors, and the remaining directors shall immediately after such vote declare the office of such director vacant, and the vacancy so created shall be filled in the same manner any other vacancy may be filled.

OTHER OFFICERS.

Sec. 7. The directors so chosen, immediately after their election, shall hold a meeting, at which they shall choose from among their number a president and a vice-president, and they shall at the same meeting choose a secretary, treasurer, and such other officers, agents and factors as they may deem necessary, who shall hold their offices until others are chosen and qualified in their stead.

Sec. 8. The board of directors shall also select an executive committee of five members, including the president, to possess and discharge all the powers of the board of directors during the intervals between its meetings. Of this committee three shall constitute a

quorum for the transaction of business, but no action taken by it shall be valid unless the same have the affirmative vote of at least three members.

Sec. 9. Said board of directors may adopt such rules and regulations for the conduct of their meetings and management of the affairs of this company as they may deem proper, not inconsistent with the law of the state of New York or these by-laws.

Sec. 10. The salary of all officers shall be fixed by a majority vote of the board of directors, and may be changed from time to time as by said board of directors may be determined.

Sec. 11. The directors may hold their meetings at such time and times and place and places, either within or without the state, as they may determine upon. Notice of such meeting shall be given by mailing a notice thereof to each director, to his post-office address as appearing in the records of the company, not less than three days before such meeting.

Article III.

Powers of Officers.

Section 1. *President.*—The president shall have power to employ and discharge all clerks, employés and agents; subject, however, to the right of the board of directors to direct, by a majority vote, the employment of any agent or other employé, or the dismissal of any agent or employé. The president shall also preside at all meetings of the company, or meetings of the stockholders of the company, and of the board of directors; shall be ex-officio a member of all committees, and shall perform such other duties as he may be directed to perform by the board of directors, and shall have a general oversight over the business and affairs of the company.

Sec. 2. *Vice-President.*—The vice-president shall, in the absence or incapacity of the president, perform the duties of that officer.

Sec. 3. *Treasurer.*—The treasurer shall deposit the money and securities belonging to this company in such bank or banks, trust companies and safe-deposit vaults as may be selected by the board of directors, and all checks or other orders for the payment of money or the delivery of securities belonging to this company shall be signed by the president and treasurer or by such other person with the treasurer as the board of directors may designate, and no payment for a greater sum than one hundred dollars shall be made except by check. The treasurer shall also keep such books of account as the directors, or a majority of them, may direct. A report of the financial condition of the company shall be made by the treasurer to the president whenever requested by the president, and a report of like character shall be submitted by the treasurer at the annual meeting; and he shall, if required by the directors at any time, give such bond

as the directors may require, and failure so to do within five days thereafter shall be held to forfeit and vacate, and shall forfeit and vacate, the office of treasurer. Every person accepting the office of treasurer shall hold the same subject to the last-mentioned limitations. The treasurer shall also sign all certificates of stock, and perform such other duties as the board of directors may require.

Sec. 4. *Secretary.*—The secretary shall be sworn to the faithful discharge of his duty, and shall record all the votes of the company and directors in a book to be kept for that purpose. He shall record all transfers of stocks and cancel and preserve all certificates of stock transferred, and he shall also keep a record alphabetically arranged of all persons who are stockholders of this company, showing their places of residence, the number of shares of stock held by them respectively, and the time when they became the owners of such shares. The address of any stockholder shall be changed whenever requested in writing by such stockholder. The secretary shall also be the transfer agent of the company for the transfer of all certificates of stock. He shall also keep the seal of the company, and affix the same to all certificates of stock and such other instruments requiring the seal as may be directed by the board of directors. The secretary shall also keep such other books and perform such other duties as may be assigned to him.

ARTICLE IV.

STOCK.

Section 1. All certificates of stock shall be signed by the president or vice-president and treasurer, and be attested by the corporate seal.

Sec. 2. Certificates of stock may be transferred, sold, assigned or pledged by an endorsement to the proper effect in writing on the back of the certificate, and delivery of such certificate by the transferrer to the transferee; provided that until notice given of such transfer to the secretary of the company, and the surrender of the certificate of stock for cancellation, and the issue of a new certificate in lieu of that surrendered, this company may regard and treat the transferrer as being still the owner of the stock.

Sec. 3. All surrendered certificates shall be marked cancelled, with the date of cancellation, by the secretary, and shall be immediately pasted into the stock-book opposite the memorandum of their issue.

Sec. 4. Duplicate certificates of stock may be issued for such as may have been lost or destroyed, upon the applicant furnishing (1) an affidavit of ownership and loss and (2) a bond of indemnity satisfactory to the company and conditioned to protect the company against all loss and damage which may occur in consequence of the issue of said duplicate certificate. And no such duplicate shall be

issued until after publication once a week for three weeks, at the expense of the applicant, of a notice of the application therefor in some newspaper of general circulation designated by the president, published in the city of the applicant's residence.

ARTICLE V.

MISCELLANEOUS.

Section 1. The seal of the company shall be circular in form, with the words "....." on the circumference, and the words "New York" in the centre.

Sec. 2. The fiscal or business year of the company shall begin on the first day of October and end on the thirtieth day of September following.

Sec. 3. Dividends shall be declared annually, or more frequently if the board shall so direct, from the surplus or net profits arising from the business of this corporation.

Sec. 4. These by-laws may be amended at any directors' meeting by vote of two-thirds of the whole board of directors. They may also be amended at any stockholders' meeting by a vote of stockholders owning not less than twenty-five per cent. of the entire capital stock issued. A copy of such amended by-laws shall be sent to each stockholder within thirty days after their adoption.

§ 137. By-Laws of United States Steel Corporation as on May 3, 1904.

ARTICLE I.

STOCKHOLDERS.

Section 1. *Annual Meeting.* The annual meeting of the stockholders of the company shall be held annually at the principal office of the company in the state of New Jersey, at twelve o'clock noon, on the third Monday of April in each year, if not a legal holiday, and if a legal holiday then on the next succeeding Monday not a legal holiday, for the purpose of electing directors, and for the transaction of such other business as may be brought before the meeting; and the terms of office of the directors of the several classes shall continue until the election of their successors at such meeting as provided in article II hereof.

Stockholders' Annual Meeting.

Date of Meeting.

It shall be the duty of the secretary to cause notice of each annual meeting to be published once in each of the four calendar weeks next preceding the meeting in at least one newspaper in each of the following places: Jersey City, N. J., New York, N. Y., Chicago, Ill., and

Advertising Notice of Meeting.

Pittsburg, Pa. Nevertheless, a failure to publish such notice, or any irregularity in such notice, or in the publication thereof, shall not affect the validity of any annual meeting, or of any proceedings at any such meeting.

Special Meetings.

Section 2. *Special Meetings.* Special meetings of the stockholders may be held at the principal office of the company in the state of New Jersey, whenever called in writing, or by vote, by a majority of the board of directors.

Advertising Notice of Meeting.

Notice of each special meeting, indicating briefly the object or objects thereof, shall by the secretary be published once in each of the four calendar weeks next preceding the meeting, in at least one newspaper in each of the following places: Jersey City, N. J., New York, N. Y., Chicago, Ill., and Pittsburg, Pa. Nevertheless, if all the stockholders shall waive notice of a special meeting, no notice of such meeting shall be required; and whenever all the stockholders shall meet in person or by proxy, such meeting shall be valid for all purposes without call or notice, and at such meeting any corporate action may be taken.

Quorum.

Section 3. *Quorum.* At any meeting of the stockholders the holders of one-third of all of the shares of the capital stock of the company, present in person or represented by proxy, shall constitute a quorum of the stockholders for all purposes, unless the representation of a larger number shall be required by law, and, in that case, the representation of the number so required, shall constitute a quorum.

If the holders of the amount of stock necessary to constitute a quorum shall fail to attend in person or by proxy at the time and place fixed by these by-laws for an annual meeting, or fixed by notice as above provided for a special meeting called by the directors, a majority in interest of the stockholders present in person or by proxy may adjourn, from time to time, without notice other than by announcement at the meeting, until holders of the amount of stock requisite to constitute a quorum shall attend. At any such adjourned meeting at which a quorum shall be present, any business may be transacted which might have been transacted at the meeting as originally notified.

Organization.

Section 4. *Organization.* The chairman of the board, and in his absence, the chairman of the finance committee, and in the absence of both, the president, shall call meetings of the stockholders to order, and shall act as chairman of such meetings. The board of directors may appoint any stockholder to act as chairman of any meeting in the absence of the chairman of the board and of the chairman of the finance committee and of the president.

Chairman.

The secretary of the company shall act as secretary at all meetings of the stockholders; but in the absence of the secretary at any meeting of the stockholders the presiding officer may appoint any person to act as secretary of the meeting.

Secretary.

Section 5. *Voting.* At each meeting of the stockholders, every stockholder shall be entitled to vote in person, or by proxy appointed by instrument in writing, subscribed by such stockholder or by his duly authorized attorney, and delivered to the inspectors at the meeting; and he shall have one vote for each share of stock standing registered in his name at the time of the closing of the transfer books for said meeting. The votes for directors, and, upon demand of any stockholder, the votes upon any question before the meeting, shall be by ballot.

Voting.

At each meeting of the stockholders, a full, true and complete list, in alphabetical order, of all of the stockholders entitled to vote at such meeting, and indicating the number of shares held by each, certified by the secretary or by the treasurer, shall be furnished. Only the persons in whose names shares of stock stand on the books of the company at the time of the closing of the transfer books for such meeting, as evidenced by the list of stockholders so furnished, shall be entitled to vote in person or by proxy on the shares so standing in their names.

List of Stockholders.

Prior to any meeting, but subsequent to the time of closing the transfer books for such meeting, any proxy may submit his powers of attorney to the secretary, or to the treasurer, for examination. The certificate of the secretary, or of the treasurer, as to the regularity of such powers of attorney, and as to the number of shares held by the persons who severally and respectively executed such powers of attorney, shall be received as prima facie evidence of the number of shares represented by the holder of such powers of attorney for the purpose of establishing the presence of a quorum at such meeting and of organizing the same, and for all other purposes.

Section 6. *Inspectors.* At each meeting of the stockholders, the polls shall be opened and closed, the proxies and ballots shall be received and be taken in charge, and all questions touching the qualification of voters and the validity of proxies and the acceptance or rejection of votes, shall be decided by three inspectors. Such inspectors shall be appointed by the board of directors before or at the meeting, or, if no such appointment shall have been made, then by the presiding officer at the meeting. If for any reason any of the inspectors previously appointed shall fail to attend or refuse or be unable to serve, inspectors in place of any so failing to attend or refusing or unable to attend, shall be appointed in like manner.

Inspectors of Election.

ARTICLE II.

BOARD OF DIRECTORS.

Section 1. *Number, Classification and Term of Office.* The business and the property of the company shall be managed and controlled by the board of directors.

Directors.

As provided in the certificate of incorporation, the directors shall be classified in respect of the time for which they shall severally hold office, by dividing them into three classes, each class consisting of one-third of the whole number of the board of directors. The directors of the first class shall be elected for a term of one year; the directors of the second class shall be elected for a term of two years, and the directors of the third class shall be elected for a term of three years. At each annual election, the successors to the directors of the class whose term shall expire in that year, shall be elected to hold office for the term of three years, so that the term of office of one class of directors shall expire in each year.

Classification.

Terms of Each Class.

The number of directors shall be twenty-four; but the number of directors may be altered from time to time by the alteration of these by-laws.

Number of Directors.

In case of any increase of the number of directors, the additional directors shall be elected by the directors then in office; one-third of such additional directors for the unexpired portion of the term of one year; one-third for the unexpired portion of the term of two years, and one-third for the unexpired portion of the term of three years, so that each class of directors shall be increased equally.

Every director shall be a holder of at least one share of the capital stock of the company. Each director shall serve for the term for which he shall have been elected, and until his successor shall have been duly chosen.

Directors must be Stockholders.

At all elections of the directors, the polls shall remain open for at least one hour, unless every registered owner of shares has sooner voted in person or by proxy, or in writing has waived the statutory provision.

Polls Open One Hour.

Section 2. *Vacancies.* In case of any vacancy in the directors of any class through death, resignation, disqualification or other cause, the remaining directors, by affirmative vote of a majority thereof, may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, and until the election of his successor.

Vacancies in Board.

Such vacancy shall be filled upon and after nominations therefor shall have been made by the finance committee.

Section 3. *Place of Meeting, Etc.* The directors may hold their meetings, and may have an office and keep the books of the company (except as otherwise may be provided for by law) in such place or places in the state of New Jersey or outside of the state of New Jersey, as the board from time to time may determine.

Place of Meeting.

Section 4. *Regular Meetings.* Regular meetings of the board of directors shall be held monthly on the last Tuesday of each month, if not a legal holiday, and if a legal holiday, then on the next succeeding Tuesday not a legal holiday. No notice shall be required for any such regular monthly meeting of the board.

Regular Monthly Meetings.

Section 5. *Special Meetings.* Special meetings of the board of directors shall be held whenever called by direction of the chairman of the board, or the chairman of the finance committee, or the president, or of one-third of the directors for the time being in office.

Special Meetings.

The secretary shall give notice of each special meeting by mailing the same at least two days before the meeting, or by telegraphing the same at least one day before the meeting, to each director; but such notice may be waived by any director. Unless otherwise indicated in the notice thereof, any and all business may be transacted at a special meeting. At any meeting at which every director shall be present, even though without any notice, any business may be transacted.

Notice Required.

Section 6. *Quorum.* A majority of the board of directors shall constitute a quorum for the transaction of business; but if at any meeting of the board there be less than a quorum present, a majority of those present may adjourn the meeting from time to time.

Quorum.

The affirmative vote of at least two-fifths of all the directors for the time being in office shall be necessary for the passage of any resolution.

Section 8. *Order of Business.* At meetings of the board of directors business shall be transacted in such order as, from time to time, the board may determine by resolution.

Order of Business.

At all meetings of the board of directors, the chairman of the board, or in his absence the chairman of the finance committee, or, in the absence of both of these officers, the president, shall preside.

Presiding Officer.

Section 9. *Contracts.* Inasmuch as the directors of this company are men of large and diversified business interests, and are likely to be connected with other corporations with which from time to time this company must have

Contracts.

business dealings, no contract or other transaction between this company and any other corporation shall be affected by the fact that directors of this company are interested in, or are directors or officers of, such other corporation, if, at the meeting of the board, or of the committee of this company, making, authorizing or confirming such contract or transaction, there shall be present a quorum of directors not so interested; and any director individually may be a party to, or may be interested in, any contract or transaction of this company, provided that such contract or transaction shall be approved or be ratified by the affirmative vote of at least ten directors not so interested.

Requiring Vote of at Least Ten Disinterested Directors.

The board of directors in its discretion may submit any contract or act for approval or ratification at any annual meeting of the stockholders, or at any meeting of the stockholders called for the purpose of considering any such act or contract; and any contract or act that shall be approved or be ratified by the vote of the holders of a majority of the capital stock of the company which is represented in person or by proxy at such meeting (provided that a lawful quorum of stockholders be there represented in person or by proxy) shall be as valid and as binding upon the corporation and upon all the stockholders as though it had been approved or ratified by every stockholder of the corporation.

Ratification by Stockholders of Acts or Contracts.

Section 10. *Compensation of Directors.* For his attendance at any meeting of the board of directors, or of any committee, every director shall receive an allowance of twenty dollars for attendance at each meeting.

Compensation of Directors.

Section 11. *Election of Officers and Committees.* At the first regular meeting of the board of directors in each year (at which a quorum shall be present) held next after the annual meeting, the board of directors shall proceed to the election of the executive officers of the company, and of the finance committee to be elected by the board of directors under the provisions of article III and article IV of the by-laws.

Election of Officers and Committees.

Article III.

FINANCE COMMITTEE.

Section 1. The board of directors shall elect from the directors a *finance committee*, and shall designate for such committee a chairman, who shall continue to be chairman of the committee during the pleasure of the board of directors.

Finance Committee.

The board of directors shall fill vacancies in the finance committee by election from the directors; and at all times it shall be the duty of the board of directors to keep the membership of such committee full, with due regard to the qualifications for such membership indicated in this article of the by-laws.

Vacancies; How Filled.

All action by the finance committee shall be reported to the board of directors at its meeting next succeeding such action, and shall be subject to revision or alteration by the board of directors; provided that no rights or acts of third parties shall be affected by any such revision or alteration.

Action of Committee to be Reported to Board.

The finance committee shall fix its own rules of proceeding, and shall meet where and as provided by such rules, or by resolution of the board of directors, but in every case the presence of at least four members shall be necessary to constitute a quorum.

Rules of Procedure.

In every case the affirmative vote of a majority of all of the members of the committee present at the meeting, shall be necessary to its adoption of any resolution.

Section 2. *The finance committee* shall consist of seven members, besides the chairman of the board and the president, each of whom, by virtue of his office, shall be a member of the finance committee. So far as practicable each of the seven elected members of the finance committee shall be a person of experience in matters of finance. Unless otherwise ordered by the board of directors, each elected member of the finance committee shall continue to be a member thereof until the expiration of his term of office as a director.

Membership.

The finance committee shall have special charge and control of all financial affairs of the company. The general counsel, the treasurer, the comptroller and the secretary, and their respective offices, shall be under the direct control and supervision of the finance committee.

Powers and Duties.

During the intervals between the meetings of the board of directors, the finance committee shall possess, and may exercise, all the powers of the board of directors in the management of all of the affairs of the company, including its purchases of property, and the execution of legal instruments with or without the corporate seal in such manner as said committee shall deem to be best for the interests of the company, in all cases in which specific directions shall not have been given by the board of directors.

During the intervals between the meetings of the finance com-

mittee, and subject to its review, the chairman of the board and the chairman of the finance committee together, shall possess, and may exercise any of the powers of the committee, except as from time to time shall be otherwise provided by resolution of the board of directors.

Powers of Chairmen.

Except as otherwise provided by the by-laws, or by resolution of the board of directors, all salaries and compensations paid or payable by the company shall be fixed by the finance committee.

Salaries Fixed by Finance Committee.

No director not an executive officer shall become a salaried employee of the company except by special vote of the finance committee.

Article IV.

ADVISORY COMMITTEE.

The board of directors shall elect from the directors an advisory committee. The committee shall consist of three members, besides the president of the corporation, who by virtue of his office shall be a member and chairman of the committee. This committee, from time to time, shall consider and make recommendations concerning such questions relating to manufacturing, transportation or operation as may be submitted to the committee by the president.

Advisory Committee.

Article V.

OFFICERS.

Section 1. *Officers.* The executive officers of the company shall be a chairman of the board of directors, a president, a vice-president, or more than one vice-president, a general counsel, a treasurer, a secretary and a comptroller, all of whom shall be elected by the board of directors.

Officers.

Titles.

The board of directors may appoint such other officers as they shall deem necessary, who shall have such authority and shall perform such duties as from time to time may be prescribed by the board of directors.

Other Officers.

The powers and duties of the treasurer and secretary may be exercised and performed by the same person.

In its discretion, the board of directors by the vote of a majority thereof may leave unfilled for any such period as it may fix by resolution, any office except those of president, treasurer, secretary and comptroller.

All officers and agents shall be subject to removal at any time by the affirmative vote of a majority of the whole board of directors. All officers, agents and employees, other than officers appointed by the board of directors, shall hold office at the discretion of the committee or of the officer appointing them.

Term of Office.

Each of the salaried officers of the corporation shall devote his entire time, skill and energy to the business of the corporation, unless the contrary is expressly consented to by the board of directors or the finance committee. No vacations shall be taken by any of such officers, except by consent of the board of directors or the finance committee.

The finance committee shall have power to remove all officers, agents and employees of the company, except officers elected or appointed by the board of directors.

Removal.

Section 3. *Powers and Duties of the Chairman of the Board.* The chairman of the board of directors shall preside at all meetings of the stockholders and of the board of directors; and by virtue of his office shall be a member of the finance committee. He shall have supervision of such matters as may be designated to him by the board of directors or the finance committee.

Chairman. Powers and Duties.

Section 4. *Powers and Duties of the President.* In the absence of the chairman of the board and the chairman of the finance committee, the president shall preside at all meetings of the stockholders and of the board of directors. By virtue of his office he shall be a member of the finance committee. Subject to the board of directors and the finance committee, he shall have general charge of the business of the corporation relating to manufacturing, mining and transportation and general operation. He shall keep the board of directors and the finance committee fully informed, and shall freely consult them concerning the business of the corporation in his charge. He may sign and execute all authorized bonds, contracts, checks or other obligations in the name of the corporation, and with the treasurer or an assistant treasurer may sign all certificates of the shares in the capital stock of the corporation. He shall do and perform such other duties as from time to time may be assigned to him by the board of directors.

President. Powers and Duties.

Section 5. *Vice-Presidents.* The board of directors may appoint a vice-president or more than one vice-president. Each vice-president shall have such powers, and shall perform such duties, as may be assigned to him by the board of directors.

Vice-Presidents.

Section 6. *The General Counsel.* The general counsel shall be the chief consulting officer of the company in all legal matters, and subject to the board of directors and the finance committee, shall have general control of all matters of legal import concerning the company.

General Counsel.

Section 7. *Powers and Duties of Treasurer.* The treasurer shall have custody of all the funds and securities of the company which may have come into his hands; when necessary or proper he shall endorse on behalf of the company, for collection, checks, notes and other obligations, and shall deposit the same to the credit of the company in such bank or banks or depositary as the board of directors or the finance committee may designate; he shall sign all receipts and vouchers for payments made to the company; jointly with such other officer as may be designated by the finance committee, he shall sign all checks made by the company, and shall pay out and dispose of the same under the direction of the board or of the finance committee; he shall sign with the president, or such other person or persons as may be designated for the purpose by the board of directors or the finance committee, all bills of exchange and promissory notes of the company; he may sign, with the president or a vice-president, all certificates of shares in the capital stock; whenever required by the board of directors or by the finance committee, he shall render a statement of his cash account; he shall enter regularly, in books of the company to be kept by him for the purpose, full and accurate account of all moneys received and paid by him on account of the company; he shall, at all reasonable times, exhibit his books and accounts to any director of the company upon application at the office of the company during business hours; and he shall perform all acts incident to the position of treasurer, subject to the control of the board of directors or of the finance committee.

Treasurer. Powers and Duties.

He shall give a bond for the faithful discharge of his duties in such sum as the board of directors or the finance committee may require.

Section 8. *Assistant Treasurers.* The board of directors or the finance committee may appoint an assistant treasurer or more than one assistant treasurer. Each assistant treasurer shall have such powers and shall perform such duties as may be assigned to him by the board of directors, or by the finance committee.

Assistant Treasurers.

Section 9. *Powers and Duties of Secretary.* The secretary shall keep the minutes of all meetings of the board of directors, and the minutes of all meetings of the stockholders, and also (unless otherwise directed by the finance committee) the minutes of all committees, in

Secretary. Powers and Duties.

books provided for that purpose; he shall attend to the giving and serving of all notices of the company; he may sign with the president, in the name of the company, all contracts authorized by the board of directors or by the finance committee, and, when so ordered by the board of directors or the finance committee, he shall affix the seal of the company thereto; he shall have charge of the certificate books, transfer books and stock ledgers, and such other books and papers as the board of directors or the finance committee may direct, all of which shall, at all reasonable times, be open to the examination of any director, upon application at the office of the company during business hours; and he shall in general perform all the duties incident to the office of secretary, subject to the control of the board of directors and of the finance committee. The offices of secretary and of treasurer may be held by one and the same person.

Assistant Secretaries.

Section 10. *Assistant Secretaries.* The board of directors or the finance committee may appoint one assistant secretary or more than one assistant secretary. Each assistant secretary shall have such powers and shall perform such duties as may be assigned to him by the board of directors or by the finance committee.

Comptroller.

Section 11. *Comptroller.* The comptroller shall be the principal officer in charge of the accounts of the company, and shall perform such duties as from time to time may be assigned to him by the board of directors or the finance committee.

Voting Upon Stocks Owned in Other Companies.

Section 12. *Voting upon Stocks.* Unless otherwise ordered by the board of directors or by the finance committee, the chairman of the board or the chairman of the finance committee shall have full power and authority in behalf of the company to attend and to act and to vote at any meetings of stockholders of any corporation in which the company may hold stock, and at any such meeting shall possess and may exercise any and all the rights and powers incident to the ownership of such stock, and which, as the owner thereof, the company might have possessed and exercised if present. The board of directors or the finance committee, by resolution, from time to time, may confer like powers upon any other person or persons.

Article VI.

Capital Stock—Seal.

Stock Certificates.

Section 1. *Certificates of Shares.* The certificates for shares of the capital stock of the company shall be in such form, not inconsistent with the certificate of incorporation, as shall be prepared or be approved by the board of

directors. The certificates shall be signed by the president or a vice-president, and also by the treasurer or an assistant treasurer.

All certificates shall be consecutively numbered. The name of the person owning the shares represented thereby, with the number of such shares and the date of issue, shall be entered on the company's books.

No certificate shall be valid unless it is signed by the president or a vice-president, and by the treasurer or an assistant treasurer.

All certificates surrendered to the company shall be canceled, and no new certificate shall be issued until the former certificate for the same number of shares of the same class shall have been surrendered and canceled.

Section 2. *Transfer of Shares.* Shares in the capital stock of the company shall be transferred only on the books of the company by the holder thereof in person, or by his attorney, upon surrender and cancellation of certificates for a like number of shares.

Transfer of Shares.

Section 3. *Regulations.* The board of directors, and the finance committee also, shall have power and authority to make all such rules and regulations as respectively they may deem expedient, concerning the issue, transfer and registration of certificates for shares of the capital stock of the company.

Regulations.

The board of directors or the finance committee may appoint a transfer agent and a registrar of transfers, and may require all stock certificates to bear the signature of such transfer agent and of such registrar of transfers.

Transfer Agent. Registrar.

Section 4. *Closing of Transfer Books.* The stock transfer books shall be closed for the meetings of the stockholders, and for the payment of dividends, during such periods as from time to time may be fixed by the board of directors or by the finance committee, and during such periods no stock shall be transferable.

Closing of Transfer Books.

Section 5. *Dividends.* The board of directors may declare dividends from the surplus or from the net profits of the company.

The dates for the declaration of dividends upon the preferred stock and upon the common stock of the company shall be the days by these by-laws fixed for the regular monthly meetings of the board of directors in the months of April, July, October and January in each year, on which days the board of directors, in its discretion, shall declare what, if any, dividends shall be declared upon the preferred stock and the common stock, or either of such stocks.

The dividends upon the preferred stock, if declared, severally and

respectively, shall be payable quarterly upon the thirtieth day of May, of August, of November and the last day of February in each year.

The dividends upon the common stock, if declared, severally and respectively, shall be payable quarterly on the thirtieth day of June, of September, of December and of March in each year.

If the date herein appointed for the payment of any dividend shall in any year fall upon a legal holiday, then the dividend payable on such date shall be paid on the next day not a legal holiday.

Working Capital.

Section 6. *Working Capital.* The directors shall not be required in January in each year, after reserving over and above its capital stock paid in, as a working capital for said corporation, such sum, if any, as shall have been fixed by the stockholders, to declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount so reserved, and pay the same to such stockholders on demand; but the board of directors may fix a sum which may be set aside or reserved, over and above the company's capital paid in, as a working capital for the company, and from time to time they may increase, diminish and vary the same in their absolute judgment and discretion.

Corporate Seal.

Section 7. *Corporate Seal.* The board of directors shall provide a suitable seal, containing the name of the company, which seal shall be in charge of the secretary. If and when so directed by the board of directors or by the finance committee, a duplicate of the seal may be kept and be used by the treasurer or by any assistant secretary or assistant treasurer.

Article VII.

Amendments.

Amendments.

Section 1. The board of directors shall have power to make, amend and repeal the by-laws of the company, by vote of a majority of all of the directors, at any regular or special meeting of the board, provided that notice of intention to make, amend or repeal the by-laws in whole or in part shall have been given at the next preceding meeting; or without any such notice, by a vote of two-thirds of all the directors.

CHAPTER VII.

FIRST MEETING OF DIRECTORS.

§ 138. Place of Holding Meeting.

Sufficient has already been said [1] to indicate that the first meeting of directors should be held within the state granting the charter, unless the statutes of that state permit the meeting to be held elsewhere, and that even in that case the wise course is to convene and transact the business of this first meeting within its borders.

[1] Supra, § 72.

§ 139. Proxies.

An important distinction must be noted between stockholders and directors with regard to their right to vote by proxy. The directors are the trustees for the stockholding body, and cannot delegate their discretionary powers to others. Hence they are not permitted to vote by proxy.[2]

§ 140. Time of Holding Meeting.

The same particularity should be observed with regard to notice, or waiver of notice, as was outlined when discussing the holding of the incorporators' meeting.[3] The form of notice heretofore inserted for the first meeting of the incorporators [4] can readily be adapted to the first meeting of directors. A form of waiver in general use is the following:

§ 141. Waiver of Notice of First Meeting of Board of Directors.

The undersigned, directors of the ..... Company, a corporation created under the laws of the state of ....., do hereby call the first meeting of the directors of said company to be held at ....., in the city of ....., on the ..... day of ....., A. D. 19.., at the hour of ..... o'clock in the .....noon, for the purpose of electing officers of the company, authorizing the issue of stock either for cash or for property, authorizing the purchase of property, and the transaction of such other business as the board may deem proper; and we hereby waive all the requirements of law and the by-laws of the company as to notice of time, place, and object of such meeting, and consent to the transaction thereat of any and all business pertaining to the company's affairs.

In testimony whereof we have signed these presents this ..... day of ....., 19.. .....

.....

[2] Perry v. Oil Co., 93 Ala. 364, 9 South. 217; State ex rel. Schroeder v. Perkins, 90 Mo. App. 603.

[3] Supra, §§ 89-90, 95-95d.

[4] Supra, § 95b.

PROCEEDINGS.

§ 142. **Organization.**

The meeting will be organized in a manner similar to that of the incorporators' meeting.[5] It is well to have the minutes show who were present, but the question of stock representation, of course, does not enter into the directors' meeting. A majority of the directors constitute a quorum, unless some different rule is prescribed by law, charter, or by-laws.[6]

§ 143. **Minutes of Incorporators' Meeting.**

In order that the directors may know what work has been committed to them by the stockholders, it is well to read the minutes of the incorporators' meeting.

§ 144. **Election of Officers.**

The election of officers would next be in order, together with a resolution fixing their salaries, if the salaries have not already been fixed by the stockholders or in the by-laws.

§ 144a. **Secretary's Oath.**

If the secretary should be ordered to take an oath of office, as is in certain places customary, and as is required in New Jersey,[7] the oath will then be administered to him. The following form of oath would be proper:

§ 145. **Form of Secretary's Oath.**

State of.....}
County of.....} ss.:

....., secretary of the .... Company, a corporation created and existing by virtue of the laws of the state of

[5] Supra, §§ 97–100.

[6] 10 Cyc. 776, and cases cited; 2 Cook, Corp. bot. p. 1751; 3 Clark & M. Corp. p. 2085; Wells v. Rubber Co., 19 N. J. Eq. 402.

[7] N. J. G. C. L. § 13.

....., being by me duly sworn, deposes and says that he will faithfully discharge his duties as secretary of said company to the best of his ability. .....

Subscribed and sworn to before me this ..... day of ....., A. D. 19... .....,

[Notarial Seal.] Notary Public.

§ 146. Treasurer's Bond.

The form of treasurer's bond, if any is required, should be passed upon, and, if the bond is ready for delivery, the sufficiency of the proposed sureties should be approved by a resolution to that effect. If a surety company is offered as security, its stereotyped form of bond for such cases will generally be insisted upon by it. Counsel for the corporation should carefully scrutinize the form, inasmuch as stipulations may be contained in it which might be prejudicial to the rights of the corporation. The ordinary bond, with individual security, is in the following or equivalent form:

§ 147. Form of Treasurer's Bond.

Know all men by these presents, that we, ..., of ....., as principal, and ....., of ....., as surety, are held and firmly bound unto the ..... Company, a corporation duly created and existing under the laws of the state of ....., and its successors and assigns, in the penal sum of $....., to be paid to said ..... Company, its certain attorney, successors or assigns, for which payment well and truly to be made we bind ourselves and each of us.

In testimony whereof, we have hereunto signed our names and affixed our seals this ..... day of ....., A. D. 19...

Whereas, the above-bounden ..... has been elected treasurer of the said ..... Company, and is about to enter upon the duties of his office as such:

Now, therefore, the condition of this obligation is such that if the above-bounden ..... shall in all respects fully and faithfully discharge his duties as such treasurer so long as he shall occupy or hold said office, whether during the continuance of the term for which he was originally elected or after to the expiration thereof, and shall properly and faithfully account to the said company, and its successors or assigns, for any and all money, property,

and chattels of any kind whatsoever for or with which the said ..... may be in any wise accountable to the said company, and also if, in the event of his death, resignation, disqualification, or removal from office for any cause, all the books, papers, accounts, money, and other property of any kind whatsoever in his possession, belonging to or relating to the affairs of said company, shall be forthwith turned over to the said company, then the above obligation is to be void; otherwise to be and remain in full force and effect.

..... [Seal.]
..... [Seal.]

Signed, sealed, and delivered in the presence of
.....
.....

§ 148. Election of Executive Committee.

If executive committee is authorized in the charter or by-laws, and the officers composing the same have not been designated, they should now be elected.

§ 149. Exchanging Stock for Property.

If the stockholders have authorized the board to accept a proposition to receive property in return for the issue of stock, this proposition should be considered, and action taken upon it. If the sense of the board is favorable to its acceptance, the proper officers should be authorized to execute the necessary papers and issue the stock agreed to be paid. The resolution should definitely recite that, in the judgment of the board of directors, the property is of a value equal to that of the stock which is issued in payment for it.[8]

§ 149a. Increasing Stock.

A resolution will also be in order, in accordance with the authority previously given by the stockholders,[8] increasing the stock beyond the amount named in the charter as that with which the company is to commence business, to such amount

[8] Supra, § 18.

as may be desired, and, if deemed proper, assessing the stock already subscribed for 100 per cent.

§ 150. Fixing Form of Stock Certificate.

Inasmuch as the directors, and not the stockholders, are the governing body of the corporation, although it has been found expedient to have the stockholders pass upon the form of stock certificate, it is wiser to have the action of the stockholders in this regard ratified and approved by the directors.

§ 151. Designating Bank.

The bank in which the treasurer is to keep his deposit should be designated by the board of directors. If this is not done, the treasurer would have authority to open an account in any event. But many reasons of policy and a considerable degree of responsibility enter into the selection of the proper bank. It is therefore more to the interest of both directors and treasurer that the board should determine what the depository is to be. The proper form of resolution can generally be obtained from the bank where the deposit is to be made. It should designate who are authorized to draw checks.

§ 152. Establishing Office, Etc.

The office of the company in the place where the business is to be transacted should be fixed upon at this meeting. Where the statutory agent upon whom process is to be served, and who is to maintain the principal office of the corporation in the parent state, is, under the laws or custom, to be designated by the directors, this designation should be made by formal resolution at this meeting.

§ 153. Powers of Attorney, Etc.

Where the corporation expects to do business in other states, the statutes of these states should be consulted, to ascertain the conditions upon which foreign corporations are permit-

ted to exercise their functions in such jurisdictions. Frequently certain powers of attorney, statements, etc., must be filed in whatever state the corporation is to conduct its affairs. These powers of attorney and statements should be authorized by the board.

§ 154. Reports, Etc.

The proper officers should also be empowered to file in the parent state the required report, stating the names of officers and directors, the amount of capital stock, etc., as required by statute; also all other statements, reports, etc., required to be filed anywhere.

§ 155. Authorizing Payment, Etc.

It is customary to pass a resolution authorizing the proper officers to procure the necessary books, etc., for the use of the company, and to pay all bills incurred in its organization.

§ 156. Directors' Functions Distinguished from Stockholders'.

It is to be observed that the stockholders' authority is, as a rule, confined to *authorizing* the directors to act. The directors do not merely authorize the performance of any act, but direct it to be done.[9] Hence the stockholders' meeting will often *authorize* the same act that the directors' meeting subsequently *directs* the proper officers to perform.

§ 156a. Any other matter of business as to which the board desires to give definite instructions to the officers should be transacted at this meeting and entered upon the minutes. The officers should see, for their own protection, that all important matters of policy are considered and determined by the board of directors before they themselves venture to take action with respect to them.

[9] See 2 Cook, Corp. §§ 708, 709; Dill, N. J. Corp. 28, 29.

§ 157. Minutes.

The following may be considered a safe form of minutes for this meeting:

MINUTES OF FIRST MEETING OF DIRECTORS.

(To be varied to suit the circumstances of each case.)

The first meeting of the directors of the ..... Company was held at ....., in the city of ....., on the ..... day of ....., A. D. 19.., at the hour of ..... o'clock in the .....noon, pursuant to notice (or pursuant to the waivers appended hereto). The meeting was called to order by Mr. ....., who called for nominations for the office of chairman. Mr. .... was duly nominated and elected to this office. He having assumed the chair, nominations for secretary were called for, pursuant to which Mr. ..... was nominated and elected to that position, and assumed the duties thereof.

The following directors were present, constituting a quorum of the board: (Insert names of directors present.)

The call (or waiver of notice) pursuant to which the meeting was convened was then read and ordered spread upon the minutes, and is in the words and figures appended hereto.

The minutes of the first meeting of the incorporators and subscribers to the capital stock were read.

The election of officers was next proceeded with, resulting in the choice of the following gentlemen to serve as officers of the company for the first year of its existence, and until their successors are elected and qualified: President (insert name); vice president (insert name); secretary (insert name); treasurer (insert name).

The salaries of these officers were fixed at the following sums, to take effect (fill in date from which salaries are to commence): President, $..... per annum; vice president, $..... per annum; secretary, $..... per annum; treasurer, $..... per annum.

(Note.—In case any of these officers are directors, as they usually are, it is well to have the minutes recite that, during the discussion upon the amount of salary to be voted to each officer, the officer whose salary was being considered was absent from the room and took no part in the discussion.)

The president thereupon assumed the chair.

The secretary then, pursuant to the motion of Mr. ....., took the written oath in the form appended to these minutes, and entered upon the discharge of his duties.

It was moved by Mr. ..... that the treasurer of the com-

pany be required to give bond in the sum of $..... for the faithful performance of his duties. This motion, being seconded, was unanimously carried. The treasurer thereupon presented a bond signed by himself as principal, and by ..... as surety, which was approved, as to form, execution, and the sufficiency of the sureties, by the board, and the form of same ordered spread upon the minutes.

The following gentlemen were then elected to constitute the executive committee for the first year of the company's existence, and until their successors are elected and qualified, to wit: (Insert names.)

(Note.—The above paragraph is only to be inserted where the members of the executive committee have not been previously designated in the charter or by-laws, or by the stockholders when they are empowered to select the committee.)

On motion of Mr. ....., the following preamble and resolutions were unanimously adopted:

Whereas, a proposition has been received from ....., offering to sell, transfer, and assign to this company the following described property (insert description); the said property to be paid for by full-paid and nonassessable stock of this company, of the par value of one hundred thousand dollars, to be issued to ..... and his assigns; offering, also, in case of the acceptance of said proposition, to donate to the treasury of the company twenty-five thousand dollars of the stock at par to be issued in payment as aforesaid; and

Whereas, by an agreement entered into between the individual incorporators of this company and said ....., the stock to be issued in payment as aforesaid is to include the stock subscribed for by said incorporators; and

Whereas, the incorporators and subscribers to the capital stock of this company, in meeting assembled on the ..... day of ....., 19.., passed a resolution reciting that, in their judgment, the said proposition was fair and reasonable, and that the value of the property offered was equal to that of the stock proposed to be taken in payment therefor, and that such property was necessary to enable the company to properly conduct its affairs, and authorizing and requesting this board, if, in their judgment, it is proper so to do, to accept said proposition and purchase the property above mentioned upon the terms thereof, and to issue stock in payment in accordance with said proposition, and designating ..... and ..... to receive and hold the twenty-five thousand dollars of stock at par to be donated to this company as therein recited, in accordance with the instructions which shall from time to time be given them by this board: and

Whereas, in the judgment of this board the said property is of the fair value of one hundred thousand dollars, and the same is necessary to enable the company to properly conduct its affairs, and the said proposition should be accepted:

Now, therefore, be it resolved that the said proposition be, and is hereby, accepted; and the proper officers of this company are hereby empowered and directed to receive the duly executed transfers and assignments of said property, and to issue in exchange therefor certificates of the capital stock of this company to the par value of one hundred thousand dollars, full-paid and nonassessable, in the name of ....., or of such persons as he may designate in writing to receive the same;

And be it further resolved that an assessment of 100 per cent. be levied upon the shares of stock subscribed by the incorporators, and that the company accept in payment of said subscriptions and assessment the property embraced within the proposition aforesaid;

And be it further resolved that said ..... and ..... are authorized to receive and hold the twenty-five thousand dollars of stock at par to be donated to this company under the terms of said proposition, and directed to hold the same until the further order of this board.

(Note.—If the proposition referred to in the foregoing paragraphs does not include the incorporators' stock, specific authority should be given to the officers to issue the stock to the incorporators.)

Upon motion of Mr. ....., it was unanimously resolved that the proper officers of this company be, and they are hereby, authorized to sell for cash, at par, one hundred thousand dollars of the capital stock of this company, in addition to the amount named in the charter as that with which the company shall commence business.

The form of stock certificates approved and adopted at the initial meeting of incorporators and subscribers to the stock was presented, and the action of said meeting in that regard ratified and approved.

On motion of Mr. ....., the following resolution was unanimously adopted:

Resolved, that the treasurer of this company be, and he is hereby, authorized and directed to open and keep an account, both for deposit and discount, with the ..... Bank in the name of and for the benefit of this company, and to deposit in such bank to its credit from time to time any and all moneys, checks, drafts, notes, acceptances, or other evidences of indebtedness which may now be in his possession or may hereafter come into his custody, and, in the name of this company, to withdraw the same, or any part of the proceeds thereof, by checks signed by both the president and treasurer of this company, and to pledge the credit of this company

as the said president and treasurer may from time to time find necessary or convenient, by means of evidences of indebtedness signed by the two said officers, and for these and all other purposes to sign, indorse, accept, make, execute, and deliver any and all checks, notes, drafts, and bills of exchange.

On motion of Mr. ....., it was resolved that an office of the company be established and maintained at (insert name of place where the company proposes to conduct its business), where meetings of the board of directors may from time to time be held; the passage of this resolution, however, not to prevent the holding of such meetings in the parent state or elsewhere as may be determined by the board of directors.

Upon motion of Mr. ....., it was resolved that the proper officers of this company be, and they are hereby, empowered and directed to execute on its behalf, in such form as may be required by law, and to acknowledge and file, the certificate or statement required by statute to be filed in any jurisdiction in which it may be found necessary to file such certificate or statement in order to authorize the company to transact business therein.

On motion of Mr. ....., the secretary was instructed to have prepared, and the proper officers authorized and directed to execute, acknowledge, and file with the proper state officials in the state of (insert name of parent state), all such statements and reports as may be required to be filed by any law, regulation, or custom in said state.

On motion of Mr. ....., the secretary was instructed to procure the proper books, stationery, and office facilities for the orderly conduct of the business of the company.

On motion of Mr. ....., the treasurer was authorized and instructed to pay from the funds of the company the expense properly incurred in connection with the incorporation and organization of this company.

The secretary was instructed to insert in the minute book, for convenience of reference, copies of the following:

(1) Waiver of notice of this meeting (copied at page .....).
(2) Secretary's oath (copied at page .....).
(3) Treasurer's bond (copied at page .....).
(4) Report to secretary of state (copied at page .....).

There being no further business, the meeting then adjourned.

....., Secretary.

§ 158. Meeting of Executive Committee.

Where there is an executive committee, the procedure at its meetings may be modeled after that of the directors.

CHAPTER VIII.

STOCK.

§ 159. Definitions.

The issue of stock is next to be considered. In order that there may be a complete understanding of the terms in ordinary use to designate the different classes of stock, certain definitions may not be amiss at this point.

§ 160. **Common Stock** is that stock "which entitles the owners of it to an equal pro rata division of profits, if any there be; one stockholder or class of stockholders having no advantage, priority, or preference over any other shareholder or class of stockholders in the division." [1]

§ 161. **Preferred Stock** is stock which entitles the holder to certain privileges, the nature of which will be treated more fully hereafter.[2]

§ 162. **Guarantied Stock** is a term loosely applied to several classes of preferred stock: First, stock, the dividends upon which are guarantied by another corporation; second, preferred stock, the dividends upon which are cumulative simply; third, preferred stock, the interest and principal of which the company guaranties and agrees to liquidate at par at a date named, in which case the certificates become practically inter-

[1] 1 Cook, Corp. § 12.

[2] Infra, §§ 172–177.

est-bearing bonds.[3] This class of stock is sometimes issued for the purchase of property. Indeed, the nature of a guaranty may assume a great number of different shapes.

§ 163. **Founders' Shares** are in more common use in England than in the United States. This is a class of stock the holders of which are entitled to the surplus profits of the company, or a certain percentage thereof, which shall remain after paying the dividends at a fixed rate on both preferred and common stock, whenever it may be determined to divide such surplus profits.[4]

§ 164. **Deferred Stock** is stock the payment of dividends upon which is expressly postponed until some other class of stockholders is paid a dividend, or until some certain obligation or liability of the corporation is satisfied.[5]

§ 165. **Overissued Stock** is stock "issued in excess of the full amount of capital stock authorized by the charter of the corporation. Such stock is void, even though issued in good faith." [6]

§ 166. **Special Stock** is a peculiar kind of stock known only, it is believed, in Massachusetts. "Its characteristics are that it is limited in amount to two-fifths of the actual capital; it is subject to redemption by the corporation at par after a fixed time, to be specified in the certificate; the corporation is bound to pay a fixed half-yearly sum or dividend upon it as a debt; the holders of it are in no event liable for the debts of the corporation beyond the amount of their stock; and the issue of special stock makes all the general stockholders liable for all debts and contracts of the corporation until the special stock is fully redeemed." [7]

§ 167. **Full-Paid Stock** is stock for which payment in full has been made either in cash, property, or services, in good faith and without fraud.

[3] 10 Cyc. 574.
[4] Dill, N. J. Corp. 359.
[5] 1 Cook, Corp. § 12.
[6] Id.
[7] Id.

§ 168. **Issued and Outstanding Stock** is that which has been bought and fully paid for, and to which somebody other than the corporation itself is entitled without further consideration.

§ 169. **Unissued Stock** is stock the issue of which has been authorized, but rights in which no person has yet acquired.

§ 170. **Treasury Stock** is stock which has once been issued as full paid and nonassessable, and which has come back into the possession of the company by donation or otherwise. It can then be sold below par, if deemed desirable.[8]

§ 171. **Watered Stock** is stock issued or authorized by the corporation to be issued without an asset behind it for its full value.

§ 172. **Preferred Stock.**

The principles governing this class of stock have been stated so succinctly by the vice-chancellor of the state of New Jersey in the case of Elkins v. Camden & A. R. Co., 36 N. J Eq. 233, 236, that the following extracts from his opinion are here quoted in full.

§ 172a. **Principles Governing.**

"There are certain legal principles pertinent to this discussion which I think are so firmly established that they may be taken for granted, without argument or the citation of authorities: First, stockholders are not creditors, and until the winding up of the corporation are entitled to nothing from it but a distribution of its net earnings; second, dividends can only be paid out of profits; third, calling stock preferred stock does not, per se, define the rights of such stock, but in order to determine in what respect the holder of such stock is to be preferred to the holder of ordinary stock resort must be had to the statute or contract under which it is issued; and, fourth, where the statute or contract under which preferred stock is

[8] Supra, § 116, and note.

issued declares or promises that the holder of such stock shall receive a dividend of a fixed and certain rate per annum, without limiting the annual sum to be paid as a dividend to profits earned or made within a designated period, as, for example, that he should receive a dividend of 7 per cent. per annum before any dividend shall be paid on the ordinary stock, there the preferred stockholder is entitled to 7 per cent. per annum from the date of the issuing of the stock held by him, whether profits sufficient to pay him each year are made or not; and if, at the first division of profits, sufficient shall not have been made to pay him the whole sum due, he may carry the arrears due him over to the next dividend, and continue to do so until he has received the whole sum due him, calculated at 7 per cent. per annum from the date of the issue of the stock held by him."

§ 173. Stating Preferences.

Preferred stock may entitle the holder to such preferences as may be specified, either as to drawing dividends, preferential voting powers, privileges upon dissolution, or what not. Sometimes the certificates of stock are issued and marked "Preferred" without the preferences appearing upon their face. Unless there is some statute, charter provision, by-law, or resolution to which the purchaser of this stock can resort to ascertain his rights, the preference is meaningless. Two or more classes of preferred stock may be created by the same corporation, each drawing a different percentage of dividend, one class to draw the entire dividend limited before the other draws anything. Inasmuch as the different classes of preferences may be numberless, great care should be taken in explicitly defining the rights of the holders of this kind of stock, and these rights should be recited in the certificate itself.[9] Frequently the holders of preferred stock are deprived of the voting power, a wise precaution in certain cases, but one which may materially interfere with the saleability of the stock.

[9] Dill. N. J. Corp. 42.

§ 174. Classes of Preferences.

In general, there may be said to be three classes of preferred stock with regard to dividends: First, the preferred stock may draw dividends at the rate stated, the common stock receiving the entire balance of the dividends declared during the year, in which case the common stock is sometimes more valuable than the preferred stock; second, the preferred stock may receive dividends at the rate stated, then the common stock receive dividends at the same rate, after which all other funds set aside for dividends are to be divided equally between the two classes of stock; third, the preferred stock may receive dividends at the rate stated, and then share equally with the common stock in all other funds set aside for dividends.

§ 175. Cumulative Dividends.

If the dividends are to be cumulative, they should be so stated.[10]

§ 176. Preferences upon Dissolution.

The preferred stockholders may or may not receive preferences upon the dissolution of the company, and they may or may not receive special voting privileges.[11]

§ 177. Conversion into Bonds.

Sometimes provision is made for converting preferred stock into bonds, or, vice versa, converting bonds into preferred stock.[12] A very clear discussion of the principles which should govern those in charge of corporate affairs in determining whether to issue preferred stock or bonds for the purpose of

[10] 10 Cyc. 573, and note. See, also, 2 Clark & M. Corp. § 529; Elkins v. Railroad Co., 36 N. J. Eq. 233; Staples v. Materials Co. [1896] 2 Ch. Div. 303.

[11] Dill, N. J. Corp. 43.

[12] Id. 43, 44.

raising money will be found in chapter 13 of the admirable treatise by Prof. Meade on "Trust Finance." [13]

§ 178. Forms.

Forms of both common and preferred stock are here appended.

§ 178a. Common Stock.

Number..... ..... Shares.

Par Value $..... Each.

The ..... Company.

Incorporated under the Laws of the State of .....

Preferred Stock, $..... Common Stock, $.....

Full Paid and Nonassessable.

This is to certify that ..... is the registered owner of..... shares of the common stock of this company, transferable only on the books of the company by the said owner in person or by duly authorized attorney upon surrender of this certificate properly endorsed.

Witness the seal of the company and the signatures of its president and secretary this ..... day of ....., A. D. 19...

....., President.

(Corporate Seal.)

Attest: .....,
Secretary.

§ 178b. Preferred Stock.

Number .... Shares.

Par Value $..... Each.

The ..... Company.

Incorporated under the Laws of the State of .....

Capital Stock, $.....

Preferred Stock, $..... Common Stock, $.....

Full Paid and Nonassessable.

This is to certify that ..... is the registered owner of ..... shares of the preferred capital stock of the ..... Company, transferable only on the books of the company by said

[13] Published by D. Appleton & Co.

owner in person, or by his duly authorized attorney, upon surrender of this certificate properly indorsed.

This stock is part of an issue amounting in all to $..... par value, authorized by the certificate of incorporation of the company filed in (insert name of office where certificate is filed), on the ..... day of ....., A. D. 19...

The owners of this preferred stock are entitled to receive and the company is bound to pay out of its surplus or net earnings a dividend at the rate of but never exceeding ..... per cent. per annum, cumulative from and after the ..... day of ....., A. D. 19.., payable quarterly, before any dividend shall be set apart or paid on the common stock.

This preferred stock may, by vote of a majority of the board of directors, be redeemed at any time after three years from the ..... day of ....., A. D. 19.., at the price of $..... per share and any accumulated dividends..

In case of liquidation or dissolution or distribution of the assets of this company, the owners of this preferred stock shall be paid the par value of their preferred shares, and the amount of dividends accumulated and unpaid thereon, before any amount shall be distributed among the owners of the common stock, and after the payment of the par value of the common stock to the owners thereof the balance of the assets and funds shall be distributed ratably among all the stockholders without preference.

Witness the seal of the company and signatures of its president and secretary this ..... day of ....., A. D. 19...

....., President.

(Corporate Seal.)

Attest: .....,
Secretary.

(Note.—The above form of certificate of preferred stock will be varied to suit the particular terms of preference. Sometimes the nature and extent of the preferences are also stated in the certificates for common stock. This is a convenient method of notifying the common stock holders of the rights which take precedence over theirs.)

§ 179. Signatures.

The certificates are generally signed by the president and secretary or treasurer, and the officers who should sign these certificates are usually designated by the laws of the state or in the by-laws of the corporation. Certificates for stock should

also be under the seal of the corporation,[14] although the omission of the seal will not render the stock invalid.[15]

§ 180. Registrar.

The certificates of stock in large corporations are also frequently signed by a trust company as registrar and transfer agent. This is because there has been a growing public demand for some guaranty of responsibility in the issue and transfer of stock. Indeed, the New York Stock Exchange has for many years past refused to list stock of any corporation whose certificates have not been registered with some responsible trust company or other suitable agency.

§ 181. Liability of Registrar.

It has been quite usual for these trust companies to endeavor to shirk any responsibility for an illegal issue or transfer by claiming the right to merely follow without inquiry the directions given them by the corporation issuing the stock. On the other hand, the corporations themselves have sought to avoid responsibility in the matter by claiming to rely upon the trust company to exercise care and judgment before issuing the stock or making the transfer. In view of this apparently divided responsibility, the public sometimes suffers more than if a registered agent had not intervened between it and the corporation whose stock is in question.

§ 182. It has been held in a series of well-considered cases that where the registrar fraudulently and criminally permits an overissue of stock the corporation issuing it would be liable to a bona fide holder for value, upon the ground that the registrar was the agent of the corporation, and, on a familiar principle of the law of agency, the principal would be bound.[16]

[14] Byers v. Rollins, 13 Colo. 22, 21 Pac. 894.

[15] Halstead v. Dodge, 1 How. Prac. (N. S.) 170, 51 N. Y. Super. Ct. 169.

[16] New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Fifth Ave.

§ 182a. Whether the trust company would itself, under these circumstances, be liable to a bona fide holder for value is an open question, and one upon which the decisions of the court have not thrown much light. It would seem that, inasmuch as the object of having a registrar is to give the public an additional guaranty of the regularity of the issue of stock, if the registrar signs certificates in this capacity, knowing that the public is looking to it to see that the requirements of the law have been observed in its issue, it should be held liable for neglect in the performance of this duty.[17] Certainly if the word "countersigned" is used by the registrar it would be liable, for the reason that "to countersign an instrument is to sign what has already been signed by a superior, to authenticate by the additional signature." When, therefore, the registrar countersigns and seals a certificate of stock, and puts it in circulation, it declares in the most formal manner that the certificate has been properly executed by the corporation, and that every essential requirement of law and of the by-laws has been carried out to make it the binding act of the company.[18]

§ 183. Shares cannot be Sold for Less than Par.

Unless the governing statute otherwise provides, a corporation cannot issue its shares in the first instance at less than par. In case of insolvency, persons who purchase their shares for less than par will be obliged to make up to the creditors the difference between the purchase price and the par value.[19] But

Bank v. Railroad Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712; Jarvis v. Beach Co., 148 N. Y. 652, 43 N. E. 68, 31 L. R. A. 776, 51 Am. St. Rep. 727. See, also, Moores v. Bank, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385.

[17] Windram v. French, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750; Jarvis v. Beach Co., 148 N. Y. 652, 43 N. E. 68, 31 L. R. A. 776, 51 Am. St. Rep. 727.

[18] Fifth Ave. Bank v. Railroad Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712.

[19] Ogilvie v. Insurance Co., 22 How. (U. S.) 380, 16 L. Ed. 349;

the Supreme Court of the United States, as well as the Court of Appeals of the State of New York, have given countenance to the doctrine that if an active corporation has become indebted to such an extent that it is without means of payment except by stock, and its shares have actually depreciated in value, it may pay such indebtedness by the issue of stock to such creditors at the actual market value; and, if it decides to issue bonds for which no market can be obtained without giving as a bonus stock in the company, this is legal, provided the par value of the bonds does not exceed their actual value plus the actual value of the stock issued as a bonus.[20]

§ 184. When Stock Certificates may be Issued.

Stock should not be issued until it has been paid for in full. Meanwhile the subscriber is entitled to receive from the treasurer or secretary a receipt for the payments made, which receipt may be transferable if so desired.

Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Chubb v. Upton, 95 U. S. 665, 24 L. Ed. 523; Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818; Hawley v. Upton, 102 U. S. 314, 26 L. Ed. 179; Congress & Empire Spring Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347; Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968; Coit v. Amalgamating Co., 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420; Bank of Ft. Madison v. Alden, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725; Washburn v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516; Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88; Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; Lloyd v. Preston, 146 U. S. 630, 13 Sup. Ct. 131, 36 L. Ed. 1111; Dickerman v. Trust Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423.

[20] Christensen v. Quintard, 55 Hun, 608, 8 N. Y. Supp. 400; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; Van Cott v. Van Brunt, 82 N. Y. 535; Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88.

§ 185. The following is a form much in use:

FORM OF INSTALLMENT CERTIFICATE.

Number ..... 10 Shares.

Par Value $100 Each.

The ..... Company.

Incorporated Under the Laws of the State of .....

Preferred Stock, $..... Common Stock, $.....

$200. New York City, ..., 1904.

This is to certify that ....., who is a subscriber for ten shares of the preferred capital stock of the ..... Company at par, has paid into the treasury of the company on account of his said subscription $20 per share. Upon payment of the remaining installments of said subscription and surrender of this certificate, accompanied by evidence that the remaining installments of said subscription have been paid, duly executed stock certificates for said ten shares will be issued to the said ..... or his assigns.

This certificate is transferable, and all the rights of the owner thereof shall pass by duly executed assignment to his assignee.

....., ...,

Secretary. President.

§ 186. As further payments are made they may either be indorsed on the above certificate, or be evidenced by new receipts for each additional payment. On the back of these certificates may appear the following form of transfer:

§ 187. **Assignment of Installment Certificates.**

For value received I hereby sell, transfer, and assign to ....., of ....., all my right, title, and interest in and to the shares of stock referred to in the within certificate, together with the payments made thereon; and I do hereby authorize and direct the proper officers of the ..... Company, upon payment in full being made for said shares under the terms of my subscription, to issue a certificate or certificates for said stock to the order of my said assignee. .....

Dated .....

Witness: .....

§ 187a. Remedy for Nonpayment.

At common law the remedy of the corporation against a shareholder who defaults upon payments for his stock is a suit upon his subscription agreement. Generally the statutes confer a remedy in addition to suit, by way of forfeiture or sale of the delinquent stock. While this is now very generally permitted, it should be remembered that forfeiture is not allowed unless the statutes or charter sanction it. It should be observed that when the remedy by forfeiture is resorted to the weight of judicial decision favors the doctrine that the subscriber is thereby released from any further liability upon his agreement. The validity of a forfeiture depends upon a strict compliance with the terms of the statute authorizing it. In the first place, the assessment must have been in absolute accord with law. Next, the stockholder in default must have been notified of the assessment and proposed forfeiture for failure to comply. This notice should have correctly stated the amount due, the time within which and the place where payment was to be made, and the intended place of sale, as well as any other matters specified in the governing statute. Lastly, the forfeiture or sale must be made in the exact manner pointed out by law, and must be for the benefit of the company, and not by way of mere collusion to relieve the stockholder from further liability. Elaborate discussions of the law relating to this subject, as well as citations of cases supporting the rules above announced, may be found in the authorities cited in the note.[21] This whole matter being statutory, and the statutes differing so widely from one another, but all prescribing minutely the practice in such matters, it has been deemed best not to insert forms for the attempted guidance of the reader. The danger in the careless use of forms lies in the fact that an important provision of a local statute, impossible of inclusion in a general form, might be omitted, and the use of the form cause more

[21] 1 Cook, Corp. c. 8; 10 Cyc. pp. 499–509.

mischief than if the draftsman had modeled his own, following the statute closely.

§ 188. Stubs.

Stock certificates are usually printed in bound books similar to bank checkbooks, containing stubs upon which certain useful information with regard to each certificate issued may be entered. It will be found convenient to keep these stubs carefully and accurately; and when the certificates are returned for cancellation or transfer they are commonly pasted to the stubs to which they were originally attached, being indelibly marked "Canceled" across their face, so that they may not by any accident subsequently come into the possession of a bona fide holder.

§ 189. Transfer of Stock.

FORM OF TRANSFER.

For value received, I hereby sell, transfer, and assign unto ....., of ....., ... shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint ..... attorney to transfer the said stock on the books of the company, with full power of substitution in the premises.

.....

Dated .....

Witness: .....

§ 190. Precautions to be Taken.

Very many interesting questions arise as to the circumstances under which the officers of the corporation will be permitted to make a transfer of stock upon the request of the holder of the certificate. In the first place, it is a principle of law that, in the absence of a statute or charter provision to the contrary, every corporation is bound to make a transfer upon the request of the party legally entitled to hold the certificate and to demand the transfer; which is merely saying that the corporation must at its peril determine whether the person presenting

the certificate for transfer is the legal holder of it, and whether under the circumstances he is entitled to demand a transfer.[22]

§ 191. Identity of Holder.

A corporation is bound to know the signatures of its stockholders.[23] Therefore the prudent secretary will always have on file the signature of every person in whose name a certificate is issued. When a certificate is presented for transfer, the signature to the assignment can then be compared with the registered signature among the records of the corporation. If the two do not correspond, an inquiry must be made and pursued until the genuineness of the signature is established.[24] The corporation may require the personal attendance of the party interested, for the purpose of determining this question.[25]

§ 192. The Right of the Holder to Transfer.

If a person making an assignment is not sui juris, the corporation will not be protected by a transfer on the order of such a person. An assignment by a lunatic is, for instance, in some jurisdictions void, upon the principle, announced by the Supreme Court of the United States,[26] that all contracts entered into by a lunatic are void. Other courts, however, have declared them to be simply voidable, and if third persons have acquired rights under them it is too late to set up their invalidity.[27] Still, a corporation having notice of the lunacy of a stockholder would assume a great risk in attempting to make a transfer upon his order. It has been held that a corporation

[22] 3 Clark & M. Corp. § 1720.

[23] 10 Cyc. 625.

[24] Western Union Telegraph Co. v. Davenport, 97 U. S. 369, 24 L. Ed. 1047; Davis v. Bank of England, 2 Bing. 393; Ireland v. Hart, 86 L. T. (N. S.; Eng. 1902) 385; 2 Cook, Corp. § 401.

[25] 2 Cook, Corp. § 410, and cases cited; Chew v. Bank, 14 Md. 299.

[26] Dexter v. Hall, 15 Wall. (U. S.) 9, 21 L. Ed. 73; 2 Cook, Corp. 427.

[27] Chew v. Bank, 14 Md. 299; Clark, Cont. 268–270.

is justified in acting upon an assignment made by a minor if it has not been avoided by the minor at the date of the application for registration.[28] This is upon the ground that a contract by a minor is not void, but merely voidable at his option.

§ 193. Rights of Third Persons.

The company must next ascertain whether it is in possession of information apprising it, either actually or constructively, of rights of third persons in the stock. If so, the respective rights of the claimants must be settled before a transfer can properly be made. Where, for example, certain stock which has been issued in the name of A. B., as trustee, is presented for transfer, according to the general trend of opinion the company must satisfy itself that the trustee is authorized under the terms of his trust to make the desired transfer.[29] As this information is sometimes difficult to obtain, the following advice given on this subject by a writer on the transfer of stock is pertinent:

§ 193a. Forms of Certificate to Trustee.

"Notice of a trust which affects stock is, in general, obtained only by means of the certificate, and it is of great importance that certificates should not be so issued as to mislead purchasers. The certificate should not state that the owner holds the stock as trustee unless it is true, and if there is a real trust the certificate should contain such a reference to it that it can readily be identified and its terms easily discovered. The common practice of issuing certificates, and inserting the word 'trustee' after the name of the owner, puts upon the purchaser and the corporation an unnecessary burden, and lays them open to indefinite future liability. The difficulty of investigating a trust described in this way is so great that many purchasers

[28] Smith v. Railroad Co., 91 Tenn. 221, 18 S. W. 546.

[29] 10 Cyc. 621, and cases cited; 1 Cook, Corp. § 399, and cases cited; 3 Clark & M. Corp. §§ 600a, 600b, and cases cited; Geyser-Marion Gold Min. Co. v. Stark, 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684.

and corporations are likely to prefer the risk of loss to the labor of hunting up the trust, and thereby the interests of the cestui que trust are imperiled, while the corporation may find itself involved in a liability which a little care at the right time would have entirely prevented." [30]

§ 194. Rights of Trustee to Transfer.

A guardian is regarded as a trustee for the purposes of the application of the rule of law above announced.[31] Whether an executor holding under a will is to be regarded as a trustee who must satisfy the corporation as to his right to make the contemplated transfer is somewhat unsettled by the decisions. Probably where the executor acts merely as such, and is not also made testamentary trustee, the corporation will be protected in making a transfer merely on the executor's order, as it would be in the case of an administrator,[32] without ascertaining whether under the terms of the will the transfer is authorized. But even then, where the statute or rules of court of the testator's domicile require an order of the court before such transfer can be made, the exhibition of a certified copy of such order should be insisted upon by the corporation,[33] and, in addition, the transfer officer must make sure that the executor has pursued the course mapped out by the order.

§ 195. Rights of Executor to Transfer.

In many cases an executor is also appointed testamentary trustee. When his duties as executor are finished, the law

[30] Lowell, Transfer Stock, § 79; Duncan v. Jaudon, 15 Wall. (U. S.) 165, 21 L. Ed. 142.

[31] Supra, § 193; Webb v. Manufacturing Co., 11 S. C. 396, 32 Am. Rep. 479; Atkinson v. Atkinson, 8 Allen (Mass.) 15; O'Herron v. Gray, 168 Mass. 573, 47 N. E. 429, 40 L. R. A. 498, 60 Am. St. Rep. 411.

[32] 10 Cyc. 622, and cases cited; 2 Cook, Corp. §§ 329, 398, and cases cited. But see 3 Clark & M. Corp. 600b, 601a, 601b, and cases cited.

[33] Weyer v. Bank, 57 Ind. 198; Fambro v. Gantt, 12 Ala. 298; Saxon v. Barksdale, 4 Desaus. (S. C.) 522.

itself, eo instante and without any action of the court, terminates his office as executor, and regards him thereafter as testamentary trustee.[34] It would be difficult for the corporation to know whether the party proposing to transfer the stock was really acting in the capacity of executor or of trustee, and for this reason it would be prudent to insist upon the exhibition of a certified copy of the will in each case.[35]

§ 196. Liability for Illegal Transfer.

The instant the party is divested of his character of executor and commences to hold stock as testamentary trustee, then all the incidents of trusteeship apply, and the company is bound to see that no transfer is made in disregard of the terms of the trust.[36] A number of interesting cases have arisen where corporations have been held to accountability because of a disregard of this rule, some of them cases which seem harsh in the extreme, but which on analysis will be found to contain a just and scientific exposition of the rule of law.[37]

§ 197. Jurisdiction of Court.

An order of the court will not always protect the company. The company must satisfy itself that the court had jurisdiction to pass the order, for, if not, the order is void. As an illustration, suppose the court should appoint an administrator of the estate of a party supposed to be dead, and thereafter authorize such administrator to sell certain stock owned by his alleged decedent's estate. Subsequently the supposed dead man ap-

[34] State, to Use of Gable, v. Cheston, 51 Md. 352, 373; Yeaton v. Lynn, 5 Pet. (U. S.) 224, 229, 8 L. Ed. 105.

[35] 1 Cook, Corp. § 398; Lowry v. Bank, Taney, 310, Fed. Cas. No. 8,581.

[36] 10 Cyc. 622, and cases cited.

[37] Caulkins v. Gaslight Co., 85 Tenn. 683, 4 S. W. 287, 4 Am. St. Rep. 786; Stewart v. Insurance Co., 53 Md. 564; Marbury v. Ehlen, 72 Md. 206, 19 Atl. 648, 20 Am. St. Rep. 467; Lowry v. Bank, Taney, 310, Fed. Cas. No. 8,581.

pears and lays claim to the stock, and files proceedings against the corporation for its illegal transfer. The order of the court would afford no protection.[38]

§ 198. Appeal Pending.

Again, an order of a competent court having jurisdiction of the subject-matter may be reversed by a higher court, in which case action taken pursuant to the order of the court below cannot be pleaded in defense of conduct contrary to that declared proper by the appellate court.[39]

§ 199. Assignment by Joint Owners.

When the title to stock has been vested in two or more persons jointly, the assignment must be united in by all in order that it may be declared valid.[40] This rule, however, does not apply to joint executors or administrators, each of whom alone has power to act on behalf of his decedent. A transfer signed by one only, therefore, would pass title.[41]

§ 200. Certificate of Stock Not Negotiable.

Certificates of stock are not negotiable,[42] and, if they are lost or stolen from the owner without fault on his part, it has been

[38] Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896; Dewing v. Perdicaries, 96 U. S. 193, 24 L. Ed. 654.

[39] 3 Cyc. 460. See Caulkins v. Gaslight Co., 85 Tenn. 683, 4 S. W. 287, 4 Am. St. Rep. 786.

[40] 2 Cook, Corp. §§ 398, 429; 10 Cyc. 625; Schell v. Deperven, 198 Pa. 591, 48 Atl. 815.

[41] Schell v. Deperven, 198 Pa. 600, 48 Atl. 813, 82 Am. St. Rep. 820; Appeal of Wood, 92 Pa. 379, 37 Am. Rep. 694; Williams, Ex'rs, Part 3, Book 1, c. 2; Lowell, Transfer of Stock, p. 36. But see Barton v. London, etc., R. R. Co., 24 Q. B. D. 77.

[42] Western Union Tel. Co. v. Davenport, 97 U. S. 369, 24 L. Ed. 1047; George H. Hammond & Co. v. Hastings, 134 U. S. 401, 10 Sup. Ct. 727, 33 L. Ed. 960.

held that his right is superior to that of any person who may acquire them by purchase from any holder.[43] This is undeniably the general rule; but when the original owner has been negligent, and by reason of such negligence a certificate of stock, with an assignment on the back signed in blank, has come into the hands of a bona fide holder for value without notice of the loss or theft, it has been held in a number of cases that the original owner is estopped from asserting his rights; as, for instance, when the true owner has pledged his stock, having first assigned it in blank, and it is afterwards, through a breach of trust, sold to such innocent purchaser. For a full discussion of this subject, the reader is referred to the authorities cited in the note.[44] The Supreme Court of the United States apparently favors the rights of the innocent purchaser in such cases, as against those of the original owner.[45]

§ 201. Lost Certificates.

Because of the principles above announced, a corporation should always insist upon the surrender of the old certificate before effecting a transfer.[46] Wherever, however, satisfactory proof has been adduced of the loss of the old certificate, and of the fact that it is unlikely to turn up in the hands of a bona fide purchaser for value, then the corporation may be compelled, upon proper security being given, to issue a new cer-

[43] East Birmingham Land Co. v. Dennis, 85 Ala. 565, 5 South. 317, 2 L. R. A. 836, 7 Am. St. Rep. 73; Barstow v. Mining Co., 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705; Knox v. Eden Musee Co., 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700.

[44] 3 Clark & M. Corp. § 595 et seq., and cases cited; 10 Cyc. 631 et seq., and cases cited; 2 Cook, Corp. §§ 472–473, and cases cited.

[45] Cowdrey v. Vandenburgh, 101 U. S. 572, 25 L. Ed. 923.

[46] South Bend First Nat. Bank v. Lanier, 11 Wall. (U. S.) 369, 20 L. Ed. 172; Cleveland & M. R. Co. v. Robbins, 35 Ohio St. 483; Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586; 1 Cook, Corp. § 402.

tificate.[47] The new certificate should recite that it is issued in lieu of the lost certificate.[48]

§ 201a. Indemnity Bond.

The practice is first to require an advertisement for a reasonable length of time, stating the loss, and then to take an indemnity bond from the party claiming the right to the transfer or to the issue of the duplicate certificate, to protect the company against any legal demand which may subsequently be made.[49]

§ 202. Form of Indemnity Bond.

Know all men by these presents that we, ..., of ....., as principal, and ....., of ....., as surety, are held and firmly bound unto the ..... Company, a corporation duly created and existing under the laws of the state of ..... and its successors and assigns, in the penal sum of $....., to be paid to the said ..... Company, its certain attorney, successors, or assigns, for which payment, well and truly to be made, we bind ourselves and each of us, and our and each of our executors, administrators, and assigns, firmly by these presents.

In testimony whereof we have hereunto signed our names and affixed our seals this ..... day of ....., A. D. 19...

Whereas, the said ..... has satisfied the said company that he is the legal owner of certificate numbered ....., for ..... shares of the (insert "common" or "preferred," as the case may be) capital stock of said company, but that the same has been lost; and the said company has therefore issued to said ..... a certificate for a like number of shares of the same class of stock in said company in lieu of said lost certificate:

Now, therefore, the condition of the above obligation is such that if the above bounden ....., and his heirs, executors, administrators, and assigns, shall at any and all times hereafter indemnify and save harmless the said ..... Company, and its succes-

[47] 2 Clark & M. Corp. § 426.

[48] Dill, N. J. Corp. 136–137.

[49] Galveston City Co. v. Sibley, 56 Tex. 269; Guilford v. Telegraph Co., 43 Minn. 434, 46 N. W. 70; 10 Cyc. 620.

sors and assigns, against any and all actions, proceedings, claims, and demands which may be brought or made against said company in consequence of its having issued such new certificate as aforesaid, or in consequence of its permitting at any time hereafter a transfer of said shares or any of them without the protection of the original certificate aforementioned; and shall also deliver or cause to be delivered up to said company the said missing certificate for cancellation if the same shall hereafter be found; and shall also reimburse said company for any and all expenses which may be incurred by it in consequence of any of the aforementioned matters; then this obligation to be null and void; otherwise to be and remain in full force and effect.

..... [Seal.]
..... [Seal.]

Signed, sealed and delivered in the presence of

.....

CHAPTER IX.

MEETINGS.

Stockholders' Meetings.

Directors' Meetings.

Stockholders' Meetings.

§ 203. Formalities.

Much that has been said while discussing the meeting of incorporators and subscribers to the capital stock will apply

as well to the subject-matter of this chapter.[1] Unless the business to be transacted at the meeting is of a merely formal character, the stockholders' meeting should not be held outside of the charter state without express statutory permission, and even then, as we have seen, there is some doubt as to the legality of such proceedings.[2] Notice of such meetings should always be given in the form required by law or by-laws, unless such notice is waived by all the stockholders, either in writing, or by their attendance, without objection, in person or by proxy.[3] If the meeting is a special one, the call should specify the time, place, and business to be transacted thereat, and no business other than that specified in the call can be legally done at such meeting.[4] Whether the meeting be regular or special, then, though notice is not *required* in the case of a *regular* meeting, the secretary will be wise if he sends to each person entitled a communication calling attention to the date, time, and place thereof, because by so doing he jogs the memory of many who would otherwise forget.

§ 204. Preparation for.

Aside from giving notice of the annual meeting, the secretary usually has several important matters to attend to prior to the time set for this assemblage of stockholders.

§ 205. Closing Transfer Book.

He should see that the transfer book is closed the number of days prior to the election which may be prescribed by the by-laws, and permit no transfer of stock within that period. The object of this is to enable him to make up the alphabetical list of stockholders commonly required to be posted in his office a certain number of days prior to the annual election.[5]

[1] Supra, c. V.
[2] Supra, §§ 87–87f.
[3] Supra, §§ 89, 95–95d.
[4] Schwarzwalder v. Tegen, 58 N. J. Eq. 319, 326, 43 Atl. 587; 10 Cyc. 323–325; 1 Morawetz, Priv. Corp. § 482.
[5] 2 Cook, Corp. § 538, and cases cited.

§ 206. **Compiling Annual Reports.**

He should also remind the various officials from whom yearly reports are expected that the time for making such reports is at hand, and furnish them with any data which they may desire from the records of the company.

§ 207. **Access to Books, Etc.**

He should prepare himself to answer any and all questions which his forethought might suggest would be put to him at the meeting, and should have at hand, conveniently arranged for ready access, all books, documents, reports, etc., which may be called for.

§ 208. **Reading the Minutes.**

When the meeting is called to order, the formalities attending its opening will be much the same as those already outlined for the first meeting of the corporation.[6] There will be, however, one marked difference, consisting in the reading of the minutes of the previous meeting—a detail which is not essential from the legal standpoint, but is of practical value in order to apprise stockholders of the condition of the business of the company at the time the last annual meeting was concluded, and to remind them of such unfinished matters as should properly be considered at the meeting then in session. It is not customary at special meetings to read the minutes of the preceding regular meeting, but there is no objection to doing this. At an adjourned meeting, also, the minutes of the prior meeting may profitably be read. After the minutes have been read, they should be either approved, or ordered amended in such places as those assembled may decide then to be inaccurate. The secretary should notice every such inaccuracy, and correct it in the margin of the minutes, with a reference to the motion or resolution by which the correction was authorized.

[6] Supra, § 97 et seq.

§ 209. Order of Business.

The order of business at regular meetings will usually be as follows:

1. Election of temporary officers, if this is not provided for in the by-laws.
2. Roll call.
3. Reading and disposition of previous unapproved minutes.
4. Annual reports of officers and committees.
5. Election of directors.
6. Unfinished business.
7. New Business.
8. Adjournment.

§ 210. Cumulative Voting.

This is a method of voting which may not be resorted to unless the statute of the parent state or the charter of the company permits it.[7] It is a device by which, when permitted, the minority may always secure and keep a representation on the board of directors. When this right exists, a stockholder may cast as many votes as shall equal the number of shares owned by him, multiplied by the number of directors to be elected. He may cast all these votes for a single director, or a certain number for one director and a less number for another, or divide them evenly among the entire number of directors to be elected, at his option. By this means the minority stockholders may sometimes elect a majority of the board of directors, should the majority not be watchful to prevent this. To illustrate, we will suppose a corporation having outstanding 10,000 shares of stock. Five directors are to be elected. The majority interest holds 6,000 shares. They distribute their votes evenly among their five candidates, giving each 6,000 votes. The holders of the other 4,000 shares distribute their votes among three directors nominated by them, thus giving to each director 6,666⅔ votes, in this way securing control of the board.

[7] State v. Stockley, 45 Ohio St. 304, 13 N. E. 279.

§ 211. Proxies.

At common law, voting by proxy was not permitted.[8] In this country legislation has generally changed this practice. The usual proxy, being intended for the ordinary corporate purposes merely, does not authorize a vote to dissolve the corporation, or to sell the entire corporate assets, or a vote upon other important business outside of the ordinary functions of a going corporation, unless the proxy itself, in general or special terms, confers the right to vote upon such questions.[9] A mere proxy is always revocable, no matter how strongly it may be expressed to be irrevocable.[10]

§ 212. Distinction Between Proxy and Power of Attorney.

A distinction not always noticed exists between a proxy and a power of attorney. The distinction is important in corporations whose by-laws prevent voting by proxy unless the proxy is dated a certain number of days before the meeting. Let us suppose the case of three joint executors. It is desired to have one of them only attend the meeting, and a power of attorney is given by all to that one to vote on behalf of all the shares of stock held by the estate. The inspectors of election would have no right to refuse to permit this vote to be cast. The power of attorney in such case would not be a proxy. As was said by the Court of Appeals of the District of Columbia, when stock is held jointly by executors, administrators, trustees, or other persons acting in a fiduciary capacity, they have the right to designate one of their number to represent the interest held by them at corporate meetings, inasmuch as the corporation is entitled to refuse recognition to more than one person to represent any one in-

[8] Taylor v. Griswold, 14 N. J. Law, 222, 27 Am. Dec. 33; Philips v. Wickham, 1 Paige (N. Y.) 590.

[9] 2 Cook, Corp. § 610, and cases cited; Smith v. Smith, 3 Desaus. (S. C.) 557.

[10] 2 Cook, Corp. § 610, and notes.

terest. "Indeed, the only way in which stock held jointly can be voted is by authority from all of them to one of their number." [11] So, too, where a corporation or a partnership owns stock, such stock may be voted by an individual agent or partner.[12] The instrument attesting his right to vote the stock is not a proxy, within the meaning of the by-law above referred to.

§ 213. Voting Trusts.

These arrangements may assume several forms. The usual method of effecting a voting trust at present is for all or a certain number of the stockholders to transfer their stock, or a portion of it, into the hands of trustees, who have the transfer registered on the books of the company, and surrender the certificates so assigned to them, taking in return a new certificate of stock in their own names as trustees; filing at the same time, as evidence of the terms of their trust, a copy of the pooling agreement. These trustees then issue to each of the persons in the pool a certificate reciting that each owner is entitled to an interest in the corporation proportioned to the number of shares originally deposited by him or his assignor, and, upon the receipt of dividends upon the trust stock held by them, the trustees will pay over to each certificate holder an amount equal to the dividend which would have come to him, had he retained his original certificate of stock—less, of course, his proportion of the expenses incident to carrying out the pooling agreement. By the arrangement between the original stockholders and the trustees, these pool certificates are transferable to the same extent as a certificate of stock would be; but the transfer does not carry with it the voting power, which is lodged permanently during the life of the trust in the trustees themselves. The voting power is thus separated from the beneficial ownership or the interest in the corporation. The

[11] Scanlan v. Snow, 2 App. D. C. 154.
[12] State v. Robiffs (N. J. Sup. 1890) 19 Atl. 1099.

scheme is useful to enable certain persons to control the policy of the corporation.

§ 213a. The validity of these agreements has frequently been under discussion in the courts. Little was known of such combinations twenty years ago, but during the last ten years they have become quite common. The decisions are in conflict, and it is difficult to lay down any rule which may safely be followed. Mr. Cook, in his work on Corporations, after a careful review of the authorities, comes to the conclusion "that a deposit of certificates of stock with trustees for a specified period of time, either with or without a transfer of the same to the trustees, is legal, and is not in violation of the usual statute against restraints on the alienation of personal property, and is not opposed to public policy, as a restraint upon trade, and is not an implied fraud upon stockholders who are not allowed to participate, and is not an illegal separation of the voting power from the ownership of the stock, provided, always, that no actual fraud is involved in the transaction. In other words, such a pooling of stock is not illegal in itself, but, like all contracts, may be illegal if actual fraud is involved." [13] This is probably the correct conclusion to be drawn from a thoughtful study of the cases.

§ 213b. Voting trusts have been sustained in cases arising both in the federal and state courts in Massachusetts,[14] New York,[15] New Jersey,[16] Alabama,[17] Illinois,[18] and California.[19]

[13] 2 Cook, Corp. bottom pages 1369–1371.

[14] Brightman v. Bates (1900) 175 Mass. 105, 55 N. E. 809.

[15] Brown v. Steamship Co. (1867) 5 Blatchf. 525, Fed. Cas. No. 2,025; Havemeyer v. Havemeyer (1878) 43 N. Y. Super. Ct. 506, affirmed 86 N. Y. 618; Williams v. Montgomery (1896) 148 N. Y. 519, 43 N. E. 57; Hey v. Dolphin (1895) 92 Hun, 230, 36 N. Y. Supp. 627.

[16] Chapman v. Bates (1895) 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459.

[17] Mobile & O. R. Co. v. Nicholas (1892) 98 Ala. 92, 12 South. 723.

[18] Ziegler v. Railroad Co. (C. C. 1895) 69 Fed. 176.

[19] Smith v. Railroad Co. (1897) 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119.

State legislatures, realizing that the demands of modern business require that these combinations should be sanctioned, have given them validity in the states of Pennsylvania [20] and New York.[21]

§ 213c. On the other hand, such pooling agreements have been condemned in the following states: Connecticut,[22] New York,[23] New Jersey,[24] Pennsylvania,[25] North Carolina,[26] Georgia,[27] Alabama,[28] Ohio,[29] and Colorado.[30]

§ 213d. The effect of the decisions in New York and Pennsylvania holding such trusts illegal is now nullified, so far as future trusts are concerned, by the statutes of those states above referred to.[31] The earlier decisions in New Jersey did not denounce all voting trusts, and intimated that such trusts might be legal under certain circumstances; and under a later decision[32] such a trust was upheld. Most of the other decisions referred to in the paragraph immediately preceding

[20] Act May 7, 1889.

[21] Chapter 355, Inc. Law 1901; G. C. L. § 20.

[22] Starbuck v. Trust Co. (1890) 60 Conn. 576, 24 Atl. 32.

[23] Fisher v. Bush (1885) 35 Hun (N. Y.) 641; Woodruff v. Railroad Co. (C. C. 1887) 30 Fed. 91.

[24] Cone v. Russell (1891) 48 N. J. Eq. 208, 21 Atl. 847; White v. Tire Co. (1893) 52 N. J. Eq. 178, 28 Atl. 75; Clowes v. Miller (1900) 60 N. J. Eq. 179, 47 Atl. 345; Kreissel v. Distilling Co. (1900) 61 N. J. Eq. 5, 47 Atl. 471; Warren et al. v. Pim (N. J. Ch. 1903) 55 Atl. 66.

[25] Vanderbilt v. Bennett (1887) 6 Pa. Co. Ct. R. 193, 2 Ry. & Corp. Law J. 409.

[26] Harvey v. Improvement Co. (N. C. 1896) 24 S. E. 489, 32 L. R. A. 265, 54 Am. St. Rep. 749.

[27] Clarke v. Banking Co. (C. C. 1892) 50 Fed. 338, 15 L. R. A. 683.

[28] Moses v. Scott (1887) 84 Ala. 608, 4 South. 742.

[29] Hafer v. Railroad Co. (1886) 14 Wkly. Law Bull. 68; State v. Oil Co. (1892) 49 Ohio St. 147, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; Ohio & M. Ry. Co. v. State (1892) 49 Ohio St. 668, 32 N. E. 933.

[30] Gould v. Head (C. C. 1889) 38 Fed. 886.

[31] Supra, § 213b, and notes.

[32] Chapman v. Bates, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459.

are either those of inferior courts, or are based upon certain circumstances surrounding the particular cases—as, for instance, that the purpose of the parties to the trust was to accomplish an illegal object; that the agreement was without consideration, and was a mere proxy, not coupled with an interest; that the owners of the beneficial interest could have no possible voice in the voting; that the trustees had themselves no beneficial interest, and therefore could not be expected to give their best thought to the welfare of the corporation; that it was one-sided, resulting in a special benefit to one or a few parties, giving no rights to others to come in and participate in it; or that a statute was violated.

§ 213e. In drafting a pooling agreement, the following points should be watchfully guarded:

A. The instrument should contain a recital, preferably under seal, showing that the contract is entered into for the benefit of the whole body of stockholders.[33]

B. The pool trustees should themselves be stockholders having a beneficial interest in the corporation. It would be wise to insert a provision waiving any right to object to their voting themselves into office.[34]

C. Provide for the substitution and appointment of new trustees. If the original trustees and the survivors are given the power of appointment and substitution, the object of the trust is best subserved.

[33] Hey v. Dolphin, 92 Hun, 230, 36 N. Y. Supp. 627; Kreissel v. Distilling Co., 61 N. J. Eq. 5, 47 Atl. 471; White v. Tire Co., 52 N. J. Eq. 178, 28 Atl. 75; Chapman v. Bates, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459; Ohio & M. R. Co. v. State, 49 Ohio St. 668, 32 N. E. 933; Smith v. Railroad Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119; Havemeyer v. Havemeyer, 43 N. Y. Super. Ct. 506; Warren v. Pim (N. J. Ch.) 55 Atl. 66.

[34] Hafer v. Railroad Co., 14 Wkly. Law Bull. (Ohio) 68; Clarke v. Banking Co. (C. C.) 50 Fed. 338, 15 L. R. A. 683; Cone v. Russell, 48 N. J. Eq. 208, 21 Atl. 847; Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32.

D. Recite some consideration other than the mere mutual covenants, as, for instance (if this be the fact), that the formation of the pool was one of the considerations leading up to the purchase of the stock. The agreement had better be under seal.[35]

E. Confer upon all stockholders the right to become parties to the pool by depositing their stock.[36] But a close watch should be kept to see that the number of persons holding stock in their own names is not reduced below the minimum limit prescribed by the statute.

F. Where it is desired to limit the number of the stockholders in the corporation, the agreement should contain a stipulation that any certificate holder desiring to part with his interest should first offer it to the company, or to other parties to the agreement, before selling it elsewhere. Such an agreement has been sustained by the Supreme Court of the United States.[37]

G. The trust should be limited to a short term of years, never in excess of the time prescribed by statute for the life of a proxy.[38]

H. Provide some method of directing the vote of the trustees by the certificate holders, either through a meeting as-

[35] Smith v. Railroad Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119; Griffith v. Jewett, 15 Wkly. Law Bull. (Ohio) 419; Hey v. Dolphin, 92 Hun, 230, 36 N. Y. Supp. 627; Vanderbilt v. Bennett, 6 Pa. Co. Ct. R. 193; Brightman v. Bates, 175 Mass. 105, 55 N. E. 809; Clowes v. Miller, 60 N. J. Eq. 179, 47 Atl. 345; Woodruff v. Railroad Co. (C. C.) 30 Fed. 91; Fisher v. Bush, 35 Hun (N. Y.) 641; Warren v. Pim (N. J. Ch.) 55 Atl. 66.

[36] Chapman v. Bates, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459; Kreissel v. Distilling Co., 61 N. J. Eq. 5, 47 Atl. 471; Warren v. Pim (N. J. Ch.) 55 Atl. 66.

[37] Morgan v. Struthers, 131 U. S. 246, 9 Sup. Ct. 726, 33 L. Ed. 132; Jones v. Brown, 171 Mass. 318, 50 N. E. 648.

[38] Moses v. Scott, 84 Ala. 608, 4 South. 742; Fisher v. Bush, 35 Hun (N. Y.) 641; Warren v. Pim (N. J. Ch.) 55 Atl. 66.

sembled for that purpose, or by written direction without such meeting.[39]

I. If desired, confer upon the trustees the right to vote for the sale of the corporate assets and franchises, should that question be presented, or to dissolve the corporation, or to do any other act in the same manner as if the beneficial owners were personally voting.[40]

J. Provide for the issue of trust certificates, and specify their form.

K. Make such trust certificates assignable.

§ 213f. The following form has been found, in practice, well adapted to accomplish the ends desired:

VOTING TRUST AGREEMENT.

This agreement made this ..... day of ....., A. D. 19.., by and between the undersigned stockholders of the ..... Company, a corporation created and existing under the laws of the state of ....., hereinafter called "the subscribers," parties of the first part, and ....., of ....., ... of ..... and ....., of ....., hereinafter called "the trustees," parties of the second part:

Whereas, it is deemed important to the interests of the subscribers to create a trust with the shareholding body as beneficiaries thereof, in order that the stock of said company shall not be liable to be bought up for speculative control, and to secure safe and prudent management in the interests of the whole number of stockholders; and

Whereas, a number of the subscribers hereto have purchased the stock of said company upon the distinct agreement and understanding that this voting trust should be created:

Now, therefore, this agreement witnesseth that in consideration

[39] Brown v. Steamship Co., 5 Blatchf. 525, Fed. Cas. No. 2,025; Ohio & M. R. Co. v. State, 49 Ohio St. 668, 32 N. E. 933; Clowes v. Miller, 60 N. J. Eq. 179, 47 Atl. 345; Havemeyer v. Havemeyer, 43 N. Y. Super. Ct. 506; Smith v. Railroad Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119; Vanderbilt v. Bennett, 6 Pa. Co. Ct. R. 193; Warren v. Pim (N. J. Ch.) 55 Atl. 66.

[40] 2 Cook, Corp. § 610.

of the premises, and of the benefits to be derived from the mutual observance of the stipulations hereinafter contained, and for other good and valuable considerations from each to the other moving, the receipt whereof are hereby acknowledged, the parties hereto mutually agree upon the covenants hereinafter contained, this agreement, however, not to become operative until the owners of a majority of the shares into which the capital stock of said company is divided, shall in person or by attorney have signed or ratified this agreement and delivered their certificates of stock as hereinafter specified.

1. The subscribers agree to assign and transfer on the books of the company, unto the trustees and their successors in the administration of this trust, the number of shares of stock owned or held by them in said company, set opposite their respective signatures hereto, and to respectively authorize and empower the said trustees and their successors as aforesaid, as attorneys in fact for said subscribers, to cause said transfer to be made on the books of said company, subject to the trusts and conditions hereinafter declared, and for this purpose to deliver to said trustees and their successors as aforesaid the certificates evidencing the said stock now owned by them, respectively.

2. The said shares of stock so transferred shall be held by said trustees and their successors for the common benefit of all the parties to this agreement and all those who may become such as herein provided under the terms and conditions hereinafter set forth.

3. As soon as practicable after said transfer of said stock on the books of said company shall have been made, said trustees shall execute and deliver to each of the subscribers hereto, and his assigns, assignable trust certificates for the number of shares set opposite their respective names, which certificates shall be in the following form:

..... *Company.*

VOTING TRUST CERTIFICATE.

No. .... Shares.

This is to certify that ..... and his assigns is entitled to ..... shares, of par value of ..... ($.....) dollars each, of the beneficial interest in the capital stock of the ..... Company, certificates for which have been issued to us, as trustees, under and in pursuance of a certain trust agreement made between certain stockholders of said company and ourselves, as trustees, dated the ..... day of ....., A. D. 19...

The holder of this certificate is entitled to the beneficial right and interest provided in and by said trust agreement, including a proportionate share of all dividends declared and paid on the stock of said company held in trust as aforesaid, less his proportionate share of the expenses incident to this trust.

In witness whereof the said trustees have hereunto set their hands and affixed their seals on the ..... day of ....., A. D. 19...

..... [Seal.]
..... [Seal.]
..... [Seal.]

4. The interest in the stock to be assigned to the trustees as herein provided is assignable by transfer upon books to be kept for that purpose by the trustees or their successors as aforesaid, by the holder of said trust certificate or certificates in person, or by written power of attorney to that effect, accompanied by a surrender of said certificate or certificates; and a transferee, by accepting a new certificate in lieu of the one so surrendered, shall be deemed to have assented to the terms and conditions of this agreement.

5. A list of the shares of stock deposited with the trustees as herein provided, as well as a record of all trust certificates issued and transferred, shall be made and kept by said trustees and their successors, which shall contain the names and addresses of said certificate holders, and the number of shares held by each, which said record shall be open to the inspection of any certificate holder demanding the same.

6. The trust hereby created shall vest in the parties of the second part and their successors in office. In case any of the said trustees shall decline to accept or serve, or upon the resignation of any of the said trustees, or whenever any of the said trustees shall part with his beneficial interest in said company, his office shall be deemed to be vacant, and the surviving or remaining trustees shall elect his successor, who shall have and exercise hereunder the same powers and duties as were intrusted to his predecessor in office; it being distinctly understood that such successor shall always hold a beneficial interest in the stock of said company. Nothing in this agreement shall be construed to prevent any one of said trustees from becoming an individual owner of trust certificates as aforesaid, or of voting for himself as an officer or director of said company.

7. Said trustees shall have power to admit to the benefits of this trust, on an equal footing with the original parties thereto, such stockholders in said company as may desire to become parties to this agreement.

8. The trust hereby created shall continue until the ..... day of ....., 19.., provided that the holders of a (fill in the fractional interest as desired) interest in the stock held by the trustees as herein provided may at any time terminate this trust at any meeting called for that purpose; written notice thereof having been previously mailed to each certificate holder at least ten days prior to the time fixed for such meeting. Upon the termination of said trust, the said trustees shall assign and transfer to the then holders of the trust certificates the amount of stock to which each holder thereof shall be entitled upon the surrender of his trust certificate or certificates.

9. The subscribers hereby constitute and appoint the said parties of the second part, and their successors in office, their, and each of their, true and lawful attorneys and proxies to appear for, represent, and vote for them at all meetings of the stockholders of the said company, with power to vote upon any and all questions which may arise at any such meeting or meetings, including the sale or mortgage of the entire franchise, assets, and property of the corporation, or the dissolution of such corporation, as fully and with the same effect as the said subscribers, or any of them, if personally present. could do. And if any difference of opinion should arise among said trustees or their successors as to the proper vote to be cast, then the voice of the majority of said trustees shall govern; and it shall not be necessary for said trustees to assemble together to consider any proposition, nor for all of said trustees to attend all meetings of stockholders, but the wishes of such absent trustee or trustees shall be evidenced by a writing signed by such absent trustee or trustees. And the said trustees and their successors are hereby authorized to designate some one of their number to actually cast the vote which all of said trustees, by reason of their being joint stockholders, shall be entitled to cast.

10. Should any question arise upon which any one of said trustees shall desire the action of the holders of the trust certificates, or upon which the owners of a majority in value of said trust certificates shall desire such action, a meeting for such purpose may be called by the trustees or majority owners desiring same as aforesaid, notice of which shall be given in writing by United States mail, addressed to each of said certificate holders at his last known place of residence, stating specifically the time, place, and object of the meeting; such notice to be mailed at least ..... days before the time fixed for holding said meeting. At such meeting the owners of such trust certificates may determine, by a two-thirds vote in value of the certificates so held by them, the manner in which they

desire the said trustees to vote; each certificate holder being entitled to one vote, either in person or by proxy, for each share of his beneficial interest in the capital stock of said company. The result of said vote shall be certified to the said trustees by the secretary of said meeting, and the said trustees shall cast their vote accordingly.

11. The legal title to all stock transferred under or by virtue of this agreement shall remain vested in the said trustees and their successors in trust, and they shall not sell, transfer, or assign the same during the continuance of the trust hereby created.

12. The said trustees shall receive all dividends which may be declared from time to time upon the stock held by them as aforesaid, and shall immediately pay out the same to the holders of the trust certificates as their respective interests may from time to time appear.

13. The said trustees shall be indemnified and saved harmless from any and all expenses, costs, damages, and other liability arising out of the acceptance of this trust and the issue of the trust certificates as aforesaid, each certificate holder being liable for and agreeing to contribute his proportionate share thereof; and, whenever any funds shall come into the hands of said trustees for distribution, they may deduct therefrom a sum sufficient to indemnify them as aforesaid, and divide the balance pro rata among the owners of said trust certificates.

14. In case any certificate holder shall desire to sell the beneficial interest in said company owned by him, or any part thereof, he shall, before offering the same to any one else, first notify said trustees of the number of shares thereof which he desires to sell, and said trustees shall immediately notify all of the holders of trust certificates, at their last known place of address, respectively, of such contemplated sale; and if the party desiring to sell as aforesaid shall not, within ten days after so notifying said trustees, receive an offer for said certificates satisfactory to him from one of said certificate holders, he may then, and not until then, offer said interest for sale to some one not a party to this trust agreement: provided, that such holder desiring to make sale as aforesaid shall not at any time dispose of any portion of his beneficial interest to any outside person for the same or at a less price than he shall be offered therefor by some party to this agreement.

In witness whereof the undersigned stockholders as aforesaid have hereunto subscribed their names and affixed their seals, and set opposite each signature the number of shares held or owned by them, respectively, which they desire to have held in trust as aforesaid;

and the said trustees, as an evidence of the acceptance of the trust hereby created, have also signed and sealed these presents.

Dated at the city of ..... on the ..... day of ....., A. D. 19...

..... [Seal.]	..... Shares.
..... [Seal.]	..... Shares.
..... [Seal.]	..... Shares.
..... [Seal.]	..... Shares.

..... [Seal.]
Trustee.
..... [Seal.]
Trustee.
..... [Seal.]
Trustee.

DIRECTORS' MEETINGS.

§ 214. General Principles.

The general principles governing stockholders' meetings also apply to meetings of the directors.[41] The law as to the time and place of meeting, and relating to the notice to be given, has already been sufficiently discussed. The stringent rule of law that directors cannot vote by proxy has also been stated.[42]

§ 215. Must Act as a Board.

Directors must act together as a board in all matters involving the exercise of discretion. The stockholders have a right to insist upon the opportunity for free discussion and interchange of views, and, unless this is afforded, except in matters purely ministerial, the directors are not living up to the measure of the obligation imposed upon them. If they choose to take the risk of acting upon the individual assent of the various members of the board, they may, of course, do so; but if this action should not be subsequently ratified in meeting it would be void, and any steps taken under it might subject the party assuming to act in this way to liabil-

[41] Supra, § 203 et seq.
[42] Supra, § 139; 10 Cyc. 776.

ity.[43] In order to permit this individual assent outside of meeting to be legal and binding, the statutes sometimes provide that any action assented to by the directors in writing, although not at a meeting, shall be as valid as if the directors had been assembled to discuss the proposition. It is believed that, in the absence of a statute, if a charter should contain such a provision, no stockholder could be heard to object to this manner of procedure.[44]

§ 216. Dividends.

The declaration of dividends generally rests with the directors, who may fix the amounts and times and places of payment.[45] They can only be declared out of the *profits,* except when the company is in liquidation and its corporate assets are being divided among shareholders.[46] The general rule is that a dividend belongs to the owner of the stock at the time it is declared, irrespective of the date when it is earned, although it may be made payable at a future date.[47] When declared, it becomes the separate property of the owner of the stock at the time it is declared, and, in the absence of a special agreement, if the stock is subsequently sold, the sale does not carry the right to declared dividends.[48] In distributing dividends the directors have no power to discriminate among shareholders of the same class.[49]

[43] 10 Cyc. 774–776; 2 Cook, Corp. § 713a, and cases cited; Clark & M. Corp. § 677, and notes.

[44] Supra, § 73, and notes.

[45] 2 Cook, Corp. § 545, and notes; 10 Cyc. 548, 549, 883, and cases cited.

[46] 2 Cook, Corp. § 546, and note; 10 Cyc. 551.

[47] Houser v. Richardson, 90 Mo. App. 134; 2 Cook, Corp. § 539, and notes; 10 Cyc. 556, and cases cited.

[48] Hopper v. Sage, 112 N. Y. 530, 20 N. E. 350, 8 Am. St. Rep. 771.

[49] Jones v. Railroad Co., 57 N. Y. 196; 2 Clark & M. Corp. § 525b, and notes; 2 Cook, Corp. § 540, and note.

§ 216a. Classes of Dividends.

The dividends which a corporation may legally make may be divided into four classes: First, cash dividends; second, stock dividends; third, bond or scrip dividends; fourth, property dividends.[50]

§ 216b. Cash Dividends.

A cash dividend is the ordinary dividend paid in money.

§ 216c. Stock Dividends.

A stock dividend is one payable in stock of the company. When the corporate assets have become enhanced beyond the par value of its capital stock by additions or improvements made by accumulating profits and applying them in this way, or from other causes, the nominal capital may be increased to the extent of the actual surplus thus acquired, and the increased stock may be distributed among the shareholders as dividends.[51]

§ 216d. Scrip and Bond Dividends.

A scrip dividend is one by which certificates are distributed as dividends among the stockholders, giving them the rights mentioned in them. A bond dividend is one declared when the corporation has a bona fide surplus, and, as evidence of that surplus and of the stockholders' right in it, bonds are issued pro rata among the stockholders, instead of distributing the surplus in cash. Instead of declaring a bond dividend, the board of directors may issue scrip pro rata among the shareholders, certifying that they are entitled, upon the sale of the surplus, to certain rights therein.[52]

[50] 2 Cook, Corp. § 534.

[51] Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525; 2 Cook, Corp. § 536, and notes; 10 Cyc. 555, and cases cited; 2 Clark & M. Corp. § 523, and notes.

[52] 2 Cook, Corp. § 535, and notes; 10 Cyc. 555, and cases cited; 2 Clark & M. Corp. § 523, and notes.

§ 216e. Property Dividends.

A property dividend is one payable in specific property, instead of cash, bonds, or scrip. The surplus accumulated may be in the shape of property not at the time readily convertible into cash, but which may be conveniently divided in kind. Or a property dividend may be declared where a corporation is in process of dissolution, having sold all its assets to another corporation, the latter distributing stock directly among the shareholders of the former company as the purchase price of the property bought. This latter kind of dividend has been declared illegal without unanimous consent of stockholders and creditors.[53]

§ 217. Creating Bonded Indebtedness.

A corporation has inherent power to issue bonds for the payment of money, and no express power need be given to that end.[54] The board of directors may authorize the creation of this class of indebtedness, secured by mortgage of the corporate property, without any authorization by the stockholders for this purpose.[55] A stockholders' meeting for the purpose of giving this authority is customary, but not necessary.[56] Bonds, unlike stock, may be issued for less than par, in the absence of fraud.[57]

§ 217a. Classes of Bonds.

Bonds may be either registered, in which case they are transferable only by assignment duly registered on the books of

[53] Infra, c. XI; 2 Cook, Corp. § 535, and notes; 2 Clark & M. Corp. § 523, and notes.

[54] 3 Cook, Corp. § 762, and notes; 10 Cyc. 1167 et seq.

[55] 3 Cook, Corp. § 808, and note; 3 Clark & M. Corp. § 691c, and notes; Hodder v. Railroad Co. (C. C.) 7 Fed. 793.

[56] 3 Cook, Corp. § 808, and note; Dill, N. J. Corp. 4. See 3 Clark & M. Corp. § 696 and notes.

[57] 10 Cyc. 1169; 3 Cook, Corp. § 776, and note; Gamble v. Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527.

the company or its registrar, and the principal and interest upon them are payable to the registered owner or his assigns by check or in cash; or coupon, in which case they have attached to them a series of coupons, each representing the installment of interest due at the respective interest periods, which coupons are payable to bearer. Coupon bonds, as well as the coupons themselves, usually pass from hand to hand by delivery. Coupon bonds are, however, sometimes registered. In that event the principal of the bond is payable only to the registered owner or his assignee. Bonds may be, and generally are, secured by mortgage, but they may be entirely unsecured.

§ 217b. Form of Registered Bond.

United States of America.
State of .....
..... Company.
Registered Twenty Year Five Per Cent. Gold Bond.

$..... No. .....

Know all men by these presents, that the ..... Company, a corporation created and existing by virtue of the laws of the state of ....., for value received, hereby promises to pay to (fill in name of registered owner) or registered assignee on the first day of ....., A. D. 19.., at the office of the National Trust Company, in the city of ....., state of ....., the sum of one thousand ($1,000.00) dollars in gold coin of the United States of America, of the present standard of weight and fineness, and to pay interest thereon from the first day of ....., A. D. 19.., at the rate of five (5) per cent. per annum; such interest to be payable to the registered owner hereof at the office aforesaid, in like gold coin, semiannually, on the first days of ..... and ..... in each year.

All payments upon this bond, both of principal and interest, shall be made without deduction of any tax or assessment which the said obligor, or its successors or assigns, may pay or be required to pay, deduct, or retain under any law or regulation heretofore or hereafter enacted by the United States, or any political community whatever.

This bond is one of a series of two hundred (200) of like form, tenor, effect, amount, and date, and numbered consecutively from

one (1) to two hundred (200), both inclusive, which said series of bonds is limited in amount to two hundred thousand ($200,000.00) dollars, and is issued in pursuance of, and in accordance with, the terms of, and is secured by, a certain trust deed or mortgage of even date herewith, duly executed by said obligor to the National Trust Company as trustee, conveying by way of security the property hereinafter described, to wit: (Insert description of property.)

This bond and said trust deed or mortgage securing same were duly authorized by the stockholders and board of directors of the obligor company at meetings of said stockholders and directors respectively duly convened and held at ..... on the ..... day of ....., A. D. 19..

In case of default in payment of the principal or any installment of interest due hereunder for a period of six months after the same shall respectively mature, the property secured by said trust deed or mortgage may be sold, and the proceeds applied towards the payment of this series of bonds in the manner specified in said trust deed or mortgage. No recourse shall be had for the payment of the principal or any installment of interest of or upon this bond, against any stockholder, officer, or director of the obligor company.

This bond is transferable only on the books of said National Trust Company upon the surrender and cancellation of this bond, and thereupon a new registered bond will be issued to the transferee in exchange therefor.

This bond shall not become or be valid until authenticated by the certificate indorsed hereon, duly executed by the said National Trust Company, the trustee named in said trust deed or mortgage.

In witness whereof the obligor company has caused these presents to be signed in its corporate name by its president, and its corporate seal to be hereunto affixed, attested by its secretary, at the city of ..... this ..... day of ....., A. D. 19...

..... Company,

By .....,

President.

[Corporate Seal.]

Attest: .....,

Secretary.

Trustees' Certificate.

This is to certify that this bond is one of a series of two hundred (200) bonds described in the trust deed or mortgage therein mentioned.

National Trust Company,

By .....,

Trust Officer.

§ 217c. Form of Coupon Bond.

United States of America.

State of .... Company.

Twenty Year Five Per Cent. Gold Coupon Bond.

$1,000.00. No. .....

Know all men by these presents that the ..... Company, a corporation created and existing by virtue of the laws of the state of ....., for value received, hereby promises to pay on the ..... day of ....., A. D. 19.., at the office of the National Trust Company, in the city of ....., state of ....., to the bearer, or, if registered, to the registered holder of this bond, the sum of one thousand ($1,000.00) dollars in gold coin of the United States of America, of the present standard of weight and fineness, and to pay interest thereon from the first day of ....., A. D. 19.., at the rate of five (5) per cent. per annum; such interest to be payable at the office aforesaid, in like gold coin, semiannually, on the first day of ..... and ..... in each year, but only upon presentation and surrender of the respective interest coupons hereto attached as they severally mature.

All payments upon this bond, both of principal and interest, shall be made without deduction of any tax or assessment which the said obligor, or its successors or assigns, may pay or be required to pay, deduct, or retain under any law or regulation heretofore or hereafter enacted, by the United States, or any political community whatsoever.

This bond is one of a series of two hundred (200) of like form, tenor, effect, amount, and date, and numbered consecutively from one (1) to two hundred (200), both inclusive, which said series of bonds is limited in amount to two hundred thousand ($200,000.00) dollars, and is issued in pursuance of, and in accordance with the terms of, and is secured by, a certain trust deed or mortgage of even date herewith, duly executed by said obligor to the National Trust Company as trustee, conveying by way of security the property hereinafter described, to wit: (Insert description of property.)

This bond and said trust deed or mortgage securing the same were duly authorized by the stockholders and board of directors of the obligor company at meetings of said stockholders and directors, respectively, duly convened and held at ..... on the ..... day of ....., A. D. 19...

In case of default in payment of the principal or any installment of interest due hereunder for a period of six months after the same

shall respectively mature, the property secured by said trust deed or mortgage may be sold, and the proceeds applied towards the payment of this series of bonds in the manner specified in the said trust deed or mortgage. No recourse shall be had for the payment of the principal or any installment of interest of or upon this bond against any stockholder, officer, or director of the obligor company.

This bond shall be transferable by delivery, unless registered in the owner's name on the books of said National Trust Company, such registry being noted on the bond by said trust company, after which no transfer shall be valid unless made on the said books and likewise noted on the bond; but the same may be again made transferable by delivery by being registered on said books in the name of bearer. Registration, however, shall not affect the transferability of the coupons hereto attached by delivery merely; and the payment to the bearer of any of such coupons shall discharge the obligor in respect of the interest therein mentioned, whether the bond shall have been registered or not.

Neither this bond, nor any coupon for interest thereon, shall become or be valid until authenticated by the certificate indorsed hereon, duly executed by the said National Trust Company, the trustee named in said trust deed or mortgage.

In witness whereof the obligor company has caused these presents to be signed in its corporate name by its president, and its corporate seal to be hereunto affixed, attested by its secretary, and coupons for such interest, bearing the engraved fac simile signature of its treasurer, to be attached hereto, at the city of ....., this ..... day of ....., A. D. 19...

..... Company,

By .....,

President.

[Corporate Seal.]

Attest: .....,

Secretary.

Form of Interest Coupons.

(Forty in Number.)

$25.00. No. .....

This coupon for twenty-five ($25.00) dollars, gold coin of the United States of America, is payable to bearer on the first day of ....., A. D. 19.., at the office of the National Trust Company in the city of ....., state of ....., without deduction for taxes, for six months' interest due on that day on its one thousand ($1,000.00) dollar twenty year five (5) per cent. gold bond No. .....,

subject to the terms of said bond, and the trust deed or mortgage therein mentioned.

..... Company,
By .....,
Treasurer.

(Note.—The certificate of the trustee under the mortgage will be indorsed as in form 217b.

As the forms of mortgage vary in the different states, no such form is inserted here. The reader is referred for guidance to Dill on New Jersey Corporations, where an elaborate form is set forth.)

§ 218. Filling Vacancies.

Directors holding over after the date for election has passed are just as much directors de jure as if they had been re-elected by the stockholders. They continue in office until their successors are elected, or until they die, resign, or become disqualified.[58] A quorum of the board of directors consists of a majority of its members, in the absence of a statute or by-law to the contrary,[59] although such a by-law may be validly made. If a majority is in attendance, a majority of that majority binds the board, though they may be a minority of the whole board.[60] When vacancies occur in the board, such vacancies must ordinarily be filled by the stockholders, unless the statutes, charter, or by-laws confer that power upon the directors, as is now generally the case.[61] An interesting question has arisen as to whether, in such an event, if the number of the board of directors be reduced, by death, resignation, disqualification, or otherwise, below a quorum, those remaining could fill the vacancies. It is generally held that they cannot do so.[62] Hence statutes have been passed in some juris-

[58] Thorington v. Gould, 59 Ala. 461; 10 Cyc. 740, and cases cited; 3 Clark & M. Corp. § 665, and cases cited.

[59] 2 Cook, Corp. bottom page 1751, and note; 3 Clark & M. Corp. § 681.

[60] 2 Cook, Corp. bottom page 1751; 3 Clark & M. Corp. p. 2087.

[61] Id. § 660.

[62] Faure Electric Accumulator Co. v. Phillipart (1888) 58 Law T. (N. S.) 525.

dictions, and charter provisions inserted or by-laws adopted in others, to prevent this interruption to the smooth running of corporate machinery.

§ 219. Annual Reports to the State.

Almost universally reports are required to be filed annually in the parent state by all corporations chartered thereby, stating a number of different items of information. The filing of these reports should be authorized at the annual meeting of the board, and the secretary should be careful to see that these reports are actually filed; otherwise a heavy statutory penalty may be incurred. The form of these reports varies to such an extent that it would be useless to attempt to insert such a form in this work, especially in view of the fact that printed blanks for this purpose can always be obtained at the office of the Secretary of the State.

CHAPTER X.

AMENDMENT OF CHARTER.

§ 220. Statute must be Followed.

Before the corporation has progressed very far with its business, it may discover that its charter is not properly adapted to the work in hand, and that it will be advisable to amend it in several particulars. If the charter has not been obtained by special legislative grant, the amendment is a comparatively simple matter; but, although simple, all the statutory requisites must be complied with, or there is danger that the amended charter may be declared null and void.[1]

§ 221. Stockholders Authorize Amendment.

The various state statutes prescribe minutely the procedure in such cases. The amendment must almost universally be authorized at a meeting of the stockholders. Action by the directors alone will not generally suffice.[2]

§ 222. Notice of Meeting.

To authorize amendments, notice of the meeting must be given in the statutory manner, both by publication and by mail. Such notice may, however, be waived by the unanimous con-

[1] Day v. Insurance Co., 75 Iowa, 694, 38 N. W. 113.
[2] 2 Cook, Corp. § 499 et seq.; 1 Clark & M. Corp. § 57c.

sent of all the stockholders, evidenced either by their expressed consent, or by their participation in the meeting without objection.[3]

§ 223. Manner of Voting.

The vote must be taken precisely as the law prescribes, and the action of the statutory number of stockholders will be binding. Sometimes that action must be unanimous, as when the charter amendment is for the purpose of increasing the authorized capital in order that preferred shares may be issued, in which case the rights of no dissenting stockholder can be postponed to those of holders of preferred stock, unless warrant for this is found in the statutes.[4] If the proposition is to increase the capital stock by a further issue of common stock, such proposition may be legally authorized by a two-thirds or a majority vote, depending upon the statutory provision. So likewise with a proposition to reduce the capital stock, to change the par value and the number of shares, to change the corporate name, or to change the location of the principal office.

§ 224. Distribution of Stock on Increase.

If an increase of stock is authorized, the existing stockholders must be given the right to subscribe for these new shares before they are offered to the public. The stockholders may, of course, waive their right by failing to avail themselves of it within a reasonable time.[5] But this principle does not apply if the new issue of stock is to be entirely devoted to purchasing additional property, because, if it should, the very

[3] Supra, § 89a.

[4] 10 Cyc. 569, and cases cited; Jones v. Railroad Co., 67 N. H. 119, 38 Atl. 120.

[5] Way v. Grease Co., 60 N. J. Eq. 263, 47 Atl. 44; 2 Clark & M. Corp. § 408; 10 Cyc. 543, 544, and cases cited; 1 Cook, Corp. § 286, and notes.

object for which it was authorized would fail.[6] If it is desired to sell the additional shares for less than par, then, if the actual value of the corporate assets justifies a stock dividend, this is frequently resorted to. By unanimous consent of the stockholders the stock thus issued to them by way of dividends is donated back to the company, and may then be disposed of as full-paid and nonassessable stock for less than its face value.[7]

§ 225. Certificate of Amendment.

After an amendment has been properly authorized, the next step is to apprise the proper authorities of the state of this change. This is usually done by a formal certificate under the hand and seal of the secretary, giving the requisite information. The statutory form should be followed.

[6] Meredith v. Iron Co., 55 N. J. Eq. 211, 37 Atl. 539, affirmed in 56 N. J. Eq. 454, 41 Atl. 1116.

[7] Supra, § 116.

CHAPTER XI.

REORGANIZATION OF CORPORATIONS.

§ 226. Reasons for.

It may be found that an amendment to the charter will not place the corporation upon the basis desired, and that a thorough reorganization will have to be resorted to. The reasons for this may be various. Possibly the laws do not permit of an amendment sufficiently liberal in its scope to accomplish the result desired; or perhaps experience may have demonstrated that the laws of the parent state of the corporation

are not well adapted to the conduct of the particular enterprise; or it may be that it is desired to "freeze out" certain stockholders; or the corporation is so thoroughly insolvent that the only way to save anything from the wreck is to sell out to a new corporation and dissolve the old and start afresh. Sometimes it is found that although the stock is issued full paid and nonassessable it is absolutely necessary to raise more money to carry on the enterprise; that this cannot be done by an increase of stock, but only by voluntary assessment; and that certain stockholders are not willing to bear their pro rata share of this added burden. In that event it is not an infrequent practice to permit the assets of the old corporation to be sold out and bought in by a new company composed of those stockholders in the old who are willing to risk more money in the venture. Whatever the reasons which underlie the reorganization may be, such reorganization usually involves either a forced or voluntary sale by the old company to the new, and the issuance of stock in the new company to all or a few of the stockholders of the old, upon a certain basis.

§ 226a. Voluntary Sale.

If the sale of the corporate assets of the existing company is a voluntary one, this involves, first, a meeting of the stockholders of the old company; second, a meeting of the directors of the old company; third, the preparation of a proposition to the new company in accordance with the resolutions passed at the two meetings last above referred to; fourth, a meeting of incorporators of the new company; fifth, a meeting of the directors of the new company; sixth, the acceptance of the proposition above referred to; seventh, the formal transfer of the property; eighth, payment therefor either in stock or in cash. Taking these various steps in order, we shall first discuss:

I.

Meeting of the Stockholders of the Old Company.

§ 227. In view of the fact that this is a meeting to consider business outside of the ordinary objects of the corporation (which are to *conduct,* not to *wind up,* its affairs), particular care should be taken to advise all the stockholders of the meeting, and of its time and place, giving this notice personally, and, if required by statute, also by publication, in such form and for such length of time as the law prescribes.[1] The usual form of proxy given for an ordinary meeting cannot be voted upon this proposition to sell the entire assets of the company.[2]

§ 227a. Resolution Authorizing Directors to Sell.

After the notice of the meeting has been read and the objects stated, the stockholders should pass a resolution similar to the following:

Whereas, a corporation has been organized under the laws of the state of ....., known as the ..... Company, for the purpose of conducting business similar to that conducted by this company, with a capital stock of one hundred thousand dollars, divided into one thousand shares; and

Whereas, it is the judgment of the stockholders of this company that it is expedient to sell to the said company the entire plant, property, and assets of this company, provided an adequate price can be obtained therefor; and

Whereas, no stock has yet been issued by said (fill in name of new company) Company, and the individual incorporators thereof have agreed that in case the proposition authorized by this resolution is accepted by said company a condition of said acceptance shall be that the property hereinabove referred to shall be taken to include

[1] Mutual Fire Ins. v. Farquhar, 86 Md. 668, 39 Atl. 527; People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.) 440; Jones v. Railroad Co., 67 N. H. 119, 38 Atl. 120; Bagley v. Oil Co., 201 Pa. 78, 50 Atl. 760, 56 L. R. A. 184.

[2] Smith v. Smith, 3 Desaus. (S. C.) 557.

the subscription price agreed to be paid by said incorporators, who are five in number:

Now, therefore, be it unanimously resolved that the directors of this company be and they are hereby authorized, if in their judgment it is expedient so to do, to sell to said ..... Company the entire plant, property, and assets of this company for the sum of one hundred thousand dollars, to be paid in the full-paid and nonassessable capital stock of said ..... Company at par, said property hereinabove referred to be taken to include the amount agreed to be paid by the five incorporators of said ..... Company, the stock in payment therefor to be issued to the following distributees in the amounts set opposite their respective names, to wit:

(Note.—Here should be inserted a schedule containing the names of the incorporators of the new company, opposite which will be set the number of shares subscribed for by each of said incorporators in the new company, which will, under our proposed scheme, generally be one share each. Then the name of the old corporation should follow for such amount of stock as it is proposed to donate as a working capital for the new company, the amount of this donation in our proposed scheme to be twenty-five thousand dollars. After this, the names of the stockholders of the old corporation should be inserted in the schedule, opposite each name being set such number of the balance of the shares in the new company as will equal his proportionate interest in the old corporation.)

And be it further resolved that the proper officers of this company be and they are hereby empowered to execute, acknowledge, and deliver all contracts, deeds, and other documents necessary and proper for carrying into effect this proposition, if the same shall be accepted.

And be it further resolved that, if said proposition shall be accepted, the directors of this corporation be and they are hereby authorized to donate to said ..... Company twenty-five thousand dollars par value of the stock of said ..... Company, to be issued directly to this corporation as hereinabove provided, said stock so to be donated to be held by said company or by trustees for its benefit, and to be used as a working capital, subject to the orders of its board of directors.

§ 227b. The arrangements outlined in this chapter can only be effected by the unanimous consent of the stockholders, and not then unless the rights of all the creditors are protected. Otherwise the directors would expose themselves to liability

for illegally disposing of the capital to the detriment of creditors.[3] Arrangements should be made for paying the debts of the old corporation prior to the transfer; otherwise, the old stockholders may be held to individual liability for them, or the creditors might pursue the assets in the possession of the new company.[4]

II.

Meeting of the Directors of the Old Company.

§ 228. At the directors' meeting called pursuant to authority conferred as above by the stockholders, a resolution should be passed directing the submission to the new company of the proposition above referred to. This resolution may be in the following form:

§ 229.

Whereas, the stockholders of this company in meeting assembled for this purpose on the ..... day of ....., A. D. 19.., authorized this board, if in its judgment it is expedient so to do, to submit to the ..... Company, a corporation organized and existing under the laws of the state of ....., the proposition hereinafter set forth; and

Whereas, in the judgment of this board it is expedient that such proposition should be submitted, and, if accepted, carried into effect:

Now, therefore, be it resolved that the proper officers of this company be, and they are hereby, empowered and directed to communicate to the ..... Company aforesaid a proposition to sell to the said company the entire plant, property, and assets of this corporation for the sum of one hundred thousand dollars, to be paid in full-paid and nonassessable stock of the said ..... Company at par, said property hereinabove referred to to be taken to include also the amount agreed to be paid by the five incorporators of said

[3] Noyes, Intercorporate Rel. § 110 et seq., and notes. See Curran v. Arkansas, 15 How. (U. S.) 304, 14 L. Ed. 705; Mason v. Mining Co., 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524; Russell v. Post, 138 U. S. 425, 11 Sup. Ct. 353, 34 L. Ed. 1009; 2 Cook, Corp. § 671 et seq.; 10 Cyc. 286; Post v. Electrical Co., 84 Fed. 371, 28 C. C. A. 431.

[4] Id.; 2 Cook, Corp. § 673, and notes; 10 Cyc. 286, and notes.

..... Company, stock in payment therefor to be issued to the following distributees in the amounts set opposite their respective names.

(Insert schedule as in stockholders' resolution outlined in § 227a.)

And be it further resolved that the proper officers of this company be, and they are hereby, empowered and directed to execute, acknowledge, and deliver all contracts, deeds, and assignments, and other documents necessary and proper for carrying into effect said proposition if accepted, and that ..... be, and he is hereby, appointed attorney in fact for this company, for it and in its name to appear before any officer authorized to take acknowledgments of deeds, and acknowledge all proper deeds and conveyances for and on behalf of this company and in its corporate name.

And be it further resolved that, if said proposition is accepted, the proper officers of this company are empowered and directed to donate to the said ..... Company twenty-five thousand dollars par value of the stock to be issued to this company in part payment for the property aforesaid, in accordance with the terms of the resolution of the stockholders hereinabove referred to, and for that purpose to execute and deliver all necessary and proper assignments and transfers of certificates of stock.

III.

Proposal from the Old Company.

§ 230.

(Fill in date.)

To the ..... Company—

Gentlemen:

Pursuant to resolutions unanimously adopted at meetings of the stockholders and directors of this company duly convened for the purpose, I am authorized and directed to communicate to you the following proposition:

Our company proposes to sell to your company our entire plant, property, and assets for the sum of one hundred thousand dollars, to be paid in full-paid and nonassessable capital stock of your company at par, said property to be taken, under an agreement with the individual incorporators of your company, to include also the amount agreed to be paid by them on account of their subscriptions; stock in payment for said property to be issued to the following distributees in the amounts set opposite their respective names:

(Fill in this schedule, as in the resolution of stockholders, § 227a.)

In case you decide to accept the foregoing proposition I am instructed to say that our company will donate to your company, or to trustees of your company to be named by you, twenty-five thousand dollars par value of the stock to be issued to our company as above suggested, such stock to be held and used by your company or its trustees as aforesaid for your benefit as a working capital, subject to the orders of your board of directors.

Yours very truly,

.....,

Secretary ..... Company.

IV.

Meeting of Incorporators and Subscribers to the Stock of New Company.

§ 231. The meeting having been convened in the manner pointed out in chapter V, and the necessary preliminaries having been disposed of, the letter of the secretary of the old company will be read, after which a resolution similar to that following should be adopted:

§ 232. Resolution Authorizing Directors to Purchase.

Whereas, a proposition has been received from the ..... Company offering to sell to this company its entire plant, property, and assets, for the sum of one hundred thousand dollars, to be paid in the full-paid and nonassessable capital stock of this company at par, said property, under an agreement with the individual incorporators of this company, to include also the amount agreed to be paid by them on account of their subscriptions, said proposition also containing an offer, in case of its acceptance by this company, to donate to this corporation or trustees to be named by it twenty-five thousand dollars par value of its stock to be issued in part payment of said property, said stock to be held and used by this company or its trustees as aforesaid for its benefit as a working capital, subject to the orders of the board of directors of this corporation; and

Whereas, in the judgment of the incorporators and subscribers to the capital stock of this company, the said proposition is fair and reasonable, and the value of the property offered is equal to that of the stock proposed to be issued in payment therefor, and such

property is necessary to enable this company to properly conduct its affairs:

Therefore be it resolved that the board of directors be and it is hereby authorized and requested, if in its judgment it is expedient so to do, to accept said proposition and purchase the property above mentioned in accordance with the terms thereof, and to issue stock in payment therefor, to the following distributees in the amounts set opposite their respective names, to wit:

(Insert schedule as in § 227a.)

And be it further resolved that such property shall be accepted in full payment of the subscriptions of the individual incorporators of this company, and said incorporators shall be released from all further obligation under their said subscriptions.

And be it further resolved that ..... and ..... be, and they are hereby, appointed trustees to receive and to hold the twenty-five thousand dollars par value of stock to be donated to this company under the terms of said proposition, in accordance with such instructions as may from time to time be given them by the board of directors.

V.

Meeting of Board of Directors of New Company.

§ 233. The board having been convened, and the preliminary formalities and business described in chapter VII having been disposed of, the proposition under consideration will then come up for discussion, and if looked upon favorably the following resolution should be passed, or one in a similar form:

§ 234. Resolution Accepting Proposition of Sale.

Whereas, the incorporators and subscribers to the capital stock of this company in meeting duly assembled for that purpose on the ..... day of ....., A. D. 19.., authorized this board, if in its judgment it should be expedient so to do, to accept a proposition from the ..... Company to purchase from it its entire plant, property, and assets for the sum of one hundred thousand dollars, to be paid in full-paid and nonassessable stock of this company at par, said property, under an agreement with the individual incorporators of this company, to include also the amount agreed to be paid by them on account of their subscriptions; said ..... Company also to donate to this company, or to trustees to be named

by it, the twenty-five thousand dollars par value of the stock to be issued in part payment for said property; and

Whereas, in the judgment of this board said property is of the fair value of one hundred thousand dollars, and the same is necessary to enable this company to properly conduct its affairs, and it is expedient that said proposition should be accepted:

Now, therefore, be it resolved that the said proposition be, and it is hereby, accepted, and the proper officers of this company are hereby empowered and directed to communicate the fact of said acceptance to the ..... Company, and to receive on behalf of this corporation the duly executed transfers and assignments of said property, and to issue in exchange therefor certificates of the capital stock of this company of the par value of one hundred thousand dollars full paid and nonassessable, in the names of the following distributees, in the proportions set opposite their respective names, to wit:

(Insert schedule as in § 227a.)

And be it further resolved that an assessment of one hundred per cent. be levied upon the shares of stock subscribed for by the incorporators, and that this company accept in payment of said subscriptions and assessment the property embraced within the proposition aforesaid.

And be it further resolved that ..... and ..... be, and they are hereby, authorized to receive the twenty-five thousand dollars par value of stock to be donated to this company under the terms of said proposition, and directed to hold the same subject to the further orders of this board.

VI.

Acceptance by New Company.

§ 235.

To the ..... Company— (Fill in date.)

Gentlemen:

In accordance with resolutions unanimously passed by the incorporators and subscribers to the capital stock of our company, and by the board of directors thereof, in meetings duly assembled, I am instructed to communicate to you the fact that your proposition contained in a letter dated ....., to sell to our company the entire plant, property, and assets of your corporation for the consideration and upon the terms therein stated, has been accepted, and that our company will be pleased to receive from you at an early

date the duly executed transfers of said property, in return for which stock will be issued in accordance with your proposition as submitted in said letter.

Respectfully,

....., Secretary ..... Company.

VII.

Formal Transfer of Property.

§ 236. Real Estate.

If the property or any part of it consist of real estate, it should be transferred by deed duly executed and recorded. The deed should recite the resolutions both of the stockholders and directors, and it is well also to have recited in it the appointment of an attorney in fact to acknowledge the deed. This is necessary under the statutes of some states.

§ 237. Personal Property.

Any portion of this property which is personal estate should be transferred by bill of sale prepared and executed with the same formalities as in the case of a deed, and subsequently recorded. In the states of Minnesota, Indiana, New York, Massachusetts, Virginia, and Oregon, and in the District of Columbia, statutes are found prohibiting transfers of the entire assets of any person or corporation without first notifying the creditors, and declaring such transfers void unless this shall have been done.[5] The statutes of the various states should be consulted before preparing bills of sale.

§ 238. Forms of Deeds, Etc.

As the forms of deeds and bills of sale vary so greatly in different jurisdictions, no forms will be inserted in this work.

[5] U. S. Senate Report 2436, 58th Cong., 2d Sess.; Act Cong. approved April 28, 1904.

They do not vary materially from those in use for the transfer of individual property, except that the resolutions authorizing the transfer should be inserted in the conveyance, and sometimes an attorney in fact should be appointed to acknowledge the instrument.

§ 239. Testimonium Clause.

The testimonium clause in common use, consisting of the words, "In witness whereof the said parties have hereunto set their hands and seals this ..... day of ....., A. D. 19....," is not adapted to corporations. A corporation has no hand, and therefore cannot execute an instrument in that way. It may contract under seal or without a seal, depending upon the subject-matter of the contract. The old rule that a corporation can only contract under seal has long since been exploded, and it is now settled that, unless the statute, charter, or by-law direct to the contrary, a corporation need contract under seal only in cases where an individual must do so.[6]

§ 240. Simple Contract.

The ordinary testimonium clause for a contract between an individual and a corporation, not under seal, would be as follows:

§ 240a.

In witness whereof the said party of the first part has signed these presents, and the said party of the second part has caused its corporate name to be hereunto subscribed by its president this ..... day of ....., A. D. 19...

[6] 10 Cyc. 1004 et seq.

§ 241. Contract under Seal.

If the same contract is under seal, the testimonium clause may be as follows:

§ 241a.

In witness whereof the said party of the first part has hereunto signed his name and affixed his seal, and the said party of the second part has caused its corporate name to be hereunto subscribed by its president, and its corporate seal to be hereunto affixed by its secretary, this ..... day of ....., A. D. 19...

§ 242. Contracts under Seal Between Two Corporations.

If the two contracting parties are corporations, the testimonium clause may be as follows:

§ 242a.

In witness whereof the parties hereto have caused their respective corporate signatures to be hereunto affixed by their respective presidents, and their corporate seals to be attached hereto by their respective secretaries, this ..... day of ....., A. D. 19...

§ 243. Signatures.

All legal papers requiring execution by or on behalf of a corporation should be executed in the *corporate name,* and not in the name of some officer as such. The signature should be

..... Company,
By ..... President.

And not

.....,
Pres. of ..... Company.

§ 244. Consequence of Improper Signature.

Should the signature be individual, although followed by the title of the officer making it, as in the last illustration given, there is great danger that the officer so signing would be held individually liable, and would have to seek his redress over against the corporation; whereas a signature in the corporate

name does not bind the officer personally, but only the corporation itself.[7] The negotiable instruments law now in force in many of our commercial states crystallizes into statute form a rule of the common law, providing that the mere addition of words describing a party signing as agent or as filling a representative capacity, without disclosing his principal, does not exempt him from personal liability.

VIII.

Payment in Stock.

§ 245. For a full treatment of this subject the reader is referred to chapter VIII.

§ 246. Donation of Stock.

After the twenty-five thousand dollars par value of stock shall have been issued to the old company in accordance with our supposed proposition, the old company will then, in compliance with its promise, transfer the same to the new company or to trustees for its use.

§ 247. Reorganization Completed.

Assuming that the new company has properly met, elected directors and officers, adopted by-laws, and gone through the necessary formalities hereinbefore outlined in chapters IV, V, VI, VII, and VIII, the process of reorganization will then have been completed, and the new company will be ready to enter upon the prosecution of its business.

[7] 10 Cyc. 1036 et seq.; 2 Cook, Corp. § 722, and cases cited.

GENERAL INDEX.

[THE FIGURES REFER TO SECTIONS.]

A

[The figures refer to sections.]

B

[The figures refer to sections.]

C

[The figures refer to sections.]

[The figures refer to sections.]

[The figures refer to sections.]

[The figures refer to sections.]

[The figures refer to sections.]

D

[The figures refer to sections.]

[The figures refer to sections.]

[The figures refer to sections.]

E

[The figures refer to sections.]

F

[The figures refer to sections.]

[The figures refer to sections.]

[The figures refer to sections.]

J

L

[The figures refer to sections.]

M

[The figures refer to sections.]

[The figures refer to sections.]

N

O

[The figures refer to sections.]

P

[The figures refer to sections.]

[The figures refer to sections.]

[The figures refer to sections.]

[The figures refer to sections.]

Q

R

[The figures refer to sections.]

S

[The figures refer to sections.]

[The figures refer to sections.]

T

[The figures refer to sections.]

[The figures refer to sections.]

U

V

[The figures refer to sections.]

W

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